DOCUMENT RESUME

ED 237 281 RC 014 454

TITLE	Migrant Education.
INSTITUTION	Harvard Univ., Cambridge, Mass. Center for Law and Education.
SPONS AGENCY	Legal Services Corp., Washington, D.C.
PUB DATE	Jun 76
NOTE	53p.
PUB TYPE	Collected Works - Serials (022)
JOURNAL CIT	Inequality In Education; n21 Jun 76
EDRS PRICE	MF01/PC03 Plus Postage.
DESCRIPTORS	*Academic Achievement; *Child Labor; Child Welfare; Curriculum; Educational Finance; Educational Opportunities; Elementary Secondary Education; *Equal Education; Farm Labor; Federal Programs; *Labor Legislation; *Migrant Education; *Migrant Programs; Program Administration; Program Design; Staff Utilization; Teacher Qualifications
IDENTIFIERS	*ESEA Title I Migrant Programs; Texas

ABSTRACT

Three articles describe the lifestyle of the children of migrant agricultural workers. First, Jose A. Cardenas provides an overview of education for migrant children. He notes academic performance deviations and underachievement resulting from their educational programs. Cardenas describes poor staffing, frequent segregation, curricula incompatible with migrant life, and the dysfunctional response of the educational system to the problem of migrant education. Second, Mark Masurofsky reports on migrant programs under Title I of the Elementary and Secondary Education Act. He outlines basic legal requirements including eligibility for migrant children only, funding to coordinate state and district migrant programs, and programs coordinated with migrant programs under Title III B of the Economic Opportunity Act. Masurofsky also discusses three persistent problems: failure to identify and serve migrant children, failure to design adequate and lawful educational programs, and failure of adequate administration of Title I migrant programs. Third, Cassandra Stockburger discusses laws governing child labor in agriculture. She explores the connection between the legislation and its enforcement and the limited educational opportunities of migrant children which result from a high dropout rate and gaps in age/grade equivalencies despite expressed parental support. Finally, she discusses opposing viewpoints about child labor. A final section provides commentary on corporal punishment, sex discrimination, bilingual/bicultural education, and disciplinary exclusion. (SB)

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INEQUALITY IN EDUCATION

Number Twenty-One
June, 1976

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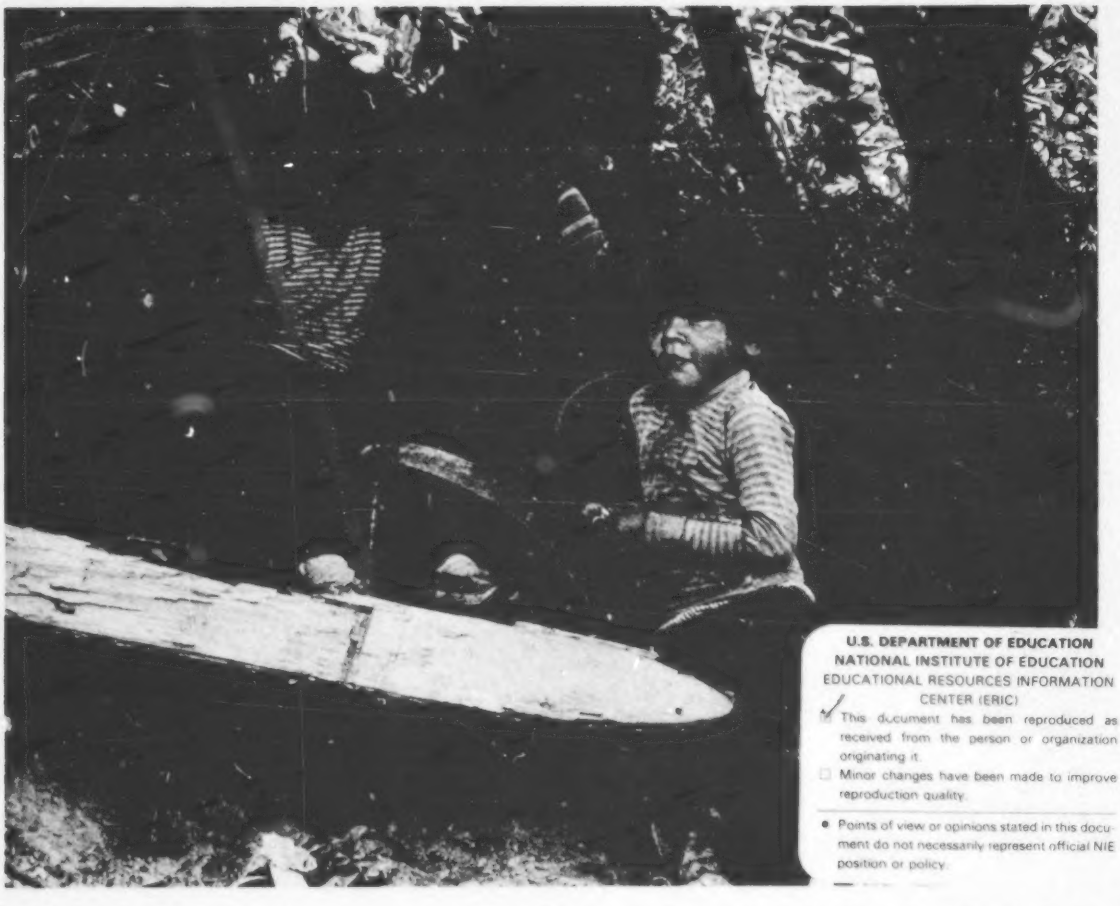

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MIGRANT EDUCATION

RC014454

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INEQUALITY IN EDUCATION
Number Twenty-One June 1976

Published by the
Center for Law and Education
Harvard University, Larsen Hall
14 Appian Way
Cambridge, Massachusetts 02138

Staff
Editor: Sharon Schumack
Editorial Assistance and Circulation: Jeanette Caurant
Back Issues: Deborah Lovejoy

Inequality in Education is published quarterly and is distributed for an annual subscription fee of $6.00.

The Center for Law and Education was established by Harvard University and the United States Office of Economic Opportunity to protect and advance the legal interests of the poor through research and action on the legal implications of educational policies, particularly those affecting equality of educational opportunity. The Center serves as a back-up center to Legal Services Corporation programs across the United States.

Director: Robert Pressman

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The research reported herein was performed pursuant to a grant from the Legal Services Corporation, Washington, D.C. 20506. The opinions expressed herein are those of the authors and should not be construed as representing the opinions or policy of any agency of the United States Government.

Introduction

Migrancy is the recurring de-stabilization of people. In one sector of the economy, agriculture, it is the involuntary response to cyclical job offers, a wage system that is the last report of the marginal worker, and massive shifts of capital structures that can leave entire communities stranded. Migrancy strains the cultural fabric of community, leaving only the bare threads of a subsistence lifestyle.

The most vulnerable victims of migrancy are the children who follow the workers who follow the crops. Jose Cardenas, in his article "Education and the Children of Migrant Farmworkers," describes the set of conditions that have resulted in grossly inferior standards and opportunities for migrant children.

The present situation with regard to schooling for migrant children is one of compensation and remediation. An analysis of the federal Title I migrant program, completed by the Lawyers' Committee for Civil Rights Under Law, is reported on by Mark Masurofsky, who also outlines the program's basic legal requirements. He concludes that failures "in the identification of migrant children and their needs, in the design and coordination of projects to meet those needs, in the evaluation of migrant education projects, and in the administration of the program at all levels has meant for many migrant children the continuation of the haphazard and disjointed education they received prior to the enactment of the Title I migrant program."

As Cassandra Stockburger notes in her article on child labor in agriculture, migrant parents often succumb to the temptation to have their children work to supplement the family's meager income. The migrant family has no way to come to grips with the frequent violations of protective legislation and compulsory education laws. Non-compliance and non-enforcement require special attention from those interested in guarding the rights of the children of migrant farmworkers.

Migrancy undercuts the capability of its victims to create their own social devices to compel enforcement of the laws enacted to protect and serve them. Nevertheless, a start can be made in that direction by organizing local monitoring groups independent of institutional control. Through such groups sustained information, counseling and guidance services can be provided. Enlightenment could lead to empowerment and to organizational experience, both prerequisites for working toward the abolition of migrancy itself.

Ernesto Galarza

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Education and The Children of Migrant Farmworkers: An Overview

by Jose A. Cardenas

If one had to identify a group of American children who underperform all others in school, the group with the highest dropout rates, the lowest achievement levels and the most failures, the group identified would undoubtedly be the children of migrant agricultural workers.

Statistics concerning the education of these children are almost unbelievable. Their performance deviates so drastically from the norm that common evaluation techniques are not even valid for this group. For instance, in an evaluation of migrant education in Texas conducted in 1968, an attempt was made to determine the percentage of migrants who dropped out of school prior to completion of the twelfth grade. Statistics derived were rather meaningless when it was discovered than an estimated 20% of all migrant children in Texas never even enrolled in school at any age.[1] Attempts to measure performance in school are consistently invalidated due to the migrant's absence during testing periods, difficulty in attaining test/post-test scores, inability of the tester to speak the language of the children, and the difficulty of establishing test rapport.

Jose Cardenas is the Executive Director of the Intercultural Development Research Association in San Antonio, Texas.

The vast majority of migrant farmworkers in the United States are Mexican American, Black and Puerto Rican; their children suffer the deprivations common to their ethnic or racial minority group, plus additional deprivations due to their economic plight, their mobility, and the low social status given to them by a more stable society. In effect, migrant students are treated as third class baggage of second class citizens.

This article will discuss the unique set of problems faced by migrant children and the schools from which they are supposed to be receiving an education.

Segregation

Perhaps the most detrimental educational situation migrant children face is their almost complete exclusion from mainstream educational programs. In following agricultural employment patterns, they spend the winter in the agricultural areas of the southern states. Several months before the end of the school year they begin to withdraw from school in order to accompany their families north in search of work. Some re-enroll in another school for the last weeks of the school year; most do not.

Students who do enroll in school this late have a difficult time integrating with the per-

Photo by Bill Cronin, courtesy of the New York State Migrant Center

manent students. If the number of migrants is large, schools invariably enroll them in "new" and separate classes, and in segregated facilities. Not only is it difficult for the migrant child to adapt to the instructional program, but it is nearly impossible to participate in extracurricular activities and other events of the school community.

After having spent the late spring, summer, and early fall seasons as transients, the migrant child returns to his/her home base in the late fall, several weeks, and perhaps months, after the school year has started. By then classes have been formed, teachers have been hired, and the returning migrant child fails to become integrated into the mainstream program. During the years of bulging school enrollments, a barracks or obsolete school building was likely to be reopened to provide space for the migrants. Most school districts anticipating an influx will place a child on "hold" until the arrival of a sufficient number of migrants to start a new class and hire a new teacher. In many cases, home districts beginning new classes in November do not arrange for a competent staff to be available to instruct the children entering school at that time.

Many school districts have perceived the problems in the education of migrant children as temporal, and have responded in kind. Since non-migrant children attend school 180 days a year for six hours a day, they hypothesized that if migrant children were to attend only 135 days, the extension of the school day to eight hours would give the migrant child the same total number of hours, and thus the same educational opportunities.

Many school districts, therefore, organized

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schools for migrants on a shortened school year and on an extended day basis. The operation of segregated facilities locked the migrant child into a separate world, oftentimes unaware of or totally out of contact with other groups of children. When migrants were assigned to schools with non-migrant children, the migrant child saw the other children leave at 3:00 p.m. and interpreted the two additional hours he or she spent in school as punishment for being a migrant.

School Finance

In most of the states in which migrant children attend school, the standard provision for allocating state resources to a school district is the use of average daily attendance (ADA) or average daily membership (ADM). Under this concept, a school district receives state funds on the basis of the number of children attending school (ADA) or enrolled (ADM). If a migrant child is in a school district for less than the total number of days in the school year, state funds received are for a fraction of the school year, i.e., if he attends school in a district for 120 days out of a 180 day term, funds in the amount of 120/180 or two-thirds of the annual rate are paid to the district.

On the surface this arrangement may seem justifiable, but school personnel face the dilemma of employing two-thirds of a teacher, buying two-thirds of a desk, or utilizing two-thirds of a textbook. Physical facilities, equipment, books, materials, and personnel must be obtained for maximum enrollments, yet allocations are based on averages. The problem is further compounded by the fact that, unlike other mobile populations where arrivals and departures tend to even out, migrant children tend to arrive and depart at the same time, in keeping with the agricultural rhythm of the community, and severely distorting enrollment figures.

The financial problems faced by school districts facing an influx of migrant children tend to encourage the development of negative perceptions and attitudes toward these children. Other types of highly mobile children, such as the children of military personnel who bring PL874 and PL815 (Federal Impact Aid) monies which are discretionary and labeled as local funds, are made to feel much more welcome. The advent of the Migrant Amendment to Title I, ESEA provided additional funds for the education of migrant children, yet the educational impact of this federal funding was negligible. Although Title I, ESEA funds are available to school districts for migrant children, these funds must supplement, not supplant, local and state resources.[2] Thus federal migrant programs are built on inadequate local and state foundations.

Staffing

The arrival of agricultural migrants in a community necessitates the acquisition of additional staff at unusual times in the educational calendar. Administrative personnel in home-based schools are reluctant not to employ the best teachers at the beginning of the school year, in anticipation of the arrival of migrant children later in the year. Therefore, personnel hired "as necessary" during the year to accommodate migrant students often do not meet the highest professional standards.

Very few migrants ever finish school, let alone go to college and become educators, so it is unusual to find a teacher with personal experiences or even deep insights into the problems and rigors of a nomadic existence. In evaluating migrant educational programs it was not unusual to find that where migrant children were integrated into mainstream classes, a large number of teachers were completely unaware of migrant children in their classes. Though all were aware that the children had entered late or withdrawn early, the teachers had not associated these attendance patterns with migrancy.[3]

Training school personnel to deal with the migrant child has not been very extensive or productive. Workshops for teaching migrant children usually involve only those teachers dealing exclusively with migrants, and much of the training is remedial oriented and dysfunctional.

Instructional Program

In spite of the fact that school districts have enrolled migrant children for many years, no major revision has been made in instructional materials or methodologies in order to accommodate the migrant child. Migrant children use materials developed for white, English-speaking,

middle class, geographically stable children which are grossly incompatible with the characteristics of migrant children. Materials and methodologies are not only culturally irrelevant, they are linguistically irrelevant, economically irrelevant, mobility irrelevant and perceptually irrelevant.

Ninety-nine percent of the migrants in Texas are Spanish-speaking, yet only in recent years have some school districts employed bilingual programs, and the percentage of migrants participating is insignificant. In other states similar problems exist for Spanish-speaking and other linguistically different migrant children.[4]

Few school districts utilize materials reflecting the culture, work, or experience of migrants. In math classes they add cream puffs, multiply hot dogs, and divide model airplanes without a clear notion of what they are. They read about the shopping mall though they may never have seen one, and the amusement park or circus is as fantastic and remote as the giant's house on top of Jack's beanstalk. The family in school books not only looks different, but it sets up a standard of Father, Mother and Baby which excludes the rest of the migrant's siblings, and shameful family appendages such as aunts, cousins, and "comrades". Migrant children who live in substandard housing without running water feel pressured to report the time of day they took a shower in order to qualify for the Cleanliness Gold Star, and in health class they learn the value of "enriched" bread, though they have never eaten anything but tortillas with their meals.

In one work book, a picture of a businessman, a laborer, and a hobo was presented to a group of migrant children. Asked to circle "Daddy" in the picture, most of the children circled the hobo. The teacher not only informed them of their incorrect performance, but gave a long tirade on the evils of hoboes, their noncontributing to the community, their laziness and dirtiness. What a horrible and traumatic experience it must be for a child to have a "Daddy" who looks like that!

School curricula have built-in continuity and sequence, and the materials assume that prerequisite skills have been presented and mastered. For example, a migrant child may run into division before he encounters multiplication. As he grows up in the educational system instead of moving from the known to the unknown, he systematically moves from the unkown to the less known.

Few of the materials developed for middle class children provide sufficient immediate positive reinforcement for the migrant child. Deferred rewards are meaningless if the child will be in Michigan when the award is being made back in Texas.

In few instances do teachers capitalize on the

Photo by Eddie Adame

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extensive travel and agricultural experience of migrant children. The middle class child who has visited Europe writes essays on the trip, makes substantial contributions to geography units, and may even make a presentation to the class on the dolls acquired in Germany, the wooden shoes from Holland, or the "banderillas" from Spain. Teachers of migrant children do not incorporate migrant travel into the curriculum, and the reading, writing, and arithmetic are far removed from the migrant's experiences.

The worst aspect of school relations with migrant children is the negative perception held by the school and consequently passed on to the children. Regardless of funding, staffing, and assignment, as long as the school views their culture, language, work and instability negatively, the performance of migrant children in school will be inadequate.

The entire instructional program is often one huge trauma, so that finding employment in a community where school officials look the other way as children work in the fields becomes a welcomed relief to the migrant child and his/her family.

Dysfunctional Responses

One very important by-product of the evaluation of migrant education in Texas[5] has been the identification of a large and diverse number of dysfunctional responses to the problems of migrant children. In general, the school either provides a response irrelevant to the nature of the problem, or persists in further punishing the children for being migrants.

Thus, the short period the migrants are in the system they are further handicapped by the school. The school day may be extended, but instruction is not individualized to provide continuity and sequence.

Like other Title I children, migrants are recipients of dysfunctional extensions and repetitions of unsuccessful techniques. The same teachers who haven't been able to teach them all day are employed to extend their lack of success for extra hours in the afternoon. Even in special classes for migrant children, the same inappropriate educational techniques persist. For example, movies, filmstrips, audio tapes and other audio-visual aids purchased with Title I Migrant Program funds are used, despite the fact that they were developed for white, English-speaking, middle class children.

Perhaps the most dysfunctional responses are in the administrative area. In order to "encourage" migrants to leave later and return earlier, school districts often tend to enact local policies which turn out to be impractical and dysfunctional. For example, almost every home district has some type of regulation regarding late entries and early withdrawals. Children who withdraw from school before some arbitrary cut-off date do not receive credit for that semester regardless of classroom performance. Similarly, children enrolling past an arbitrary date could not receive credit for work performed in the first semester. Such policies, rigorously enforced in secondary schools, preclude the acquisition of Carnegie units, the standardized unit for credit in high school work. It is easy to see how a student unable to acquire the credits necessary for promotion and graduation would be strongly tempted to withdraw from school at an early age and forego an education. The different policies which prevail in various states and school districts further confound this problem.

Other Social Institutions

The school is not the only institution which fails to respond to the needs of migrants. The areas of government employment, housing, social services, medicine, welfare and justice also have an abundance of policies and practices developed for and compatible with a primarily white, English-speaking, middle class and less mobile population. Migrant agricultural workers are commonly excluded from National Labor Relations Board coverage, minimum wage laws, participation in the democratic political process, eligibility for services, and continuity of treatment. It appears that not only the schools, but the entire social system excludes the migrants from receiving basic goods and services, and locks them into successive generations of hopelessness.

Recommendations

Children of migrant agricultural workers stand out in their lack of success in education. In

Photo by Bill Cronin, courtesy of the New York State Migrant Center

terms of dropout rates, underachievement, grade retention and failure, they do worse than any other minority group. Past efforts to alleviate their plight have been unsuccessful because of the emphasis placed on attempting to extend a system of education incompatible with the characteristics of the migrant. A traditional approach to the education of migrant children has been to afford them the same, or more of the same, instructional program developed for other children.

The recent *Lau v Nichols*[6] Supreme Court decision declared that equal treatment does not constitute equality of educational opportunity. The school may not ignore special characteristics of children and have the children assume the responsibility for adapting to an irrelevant school experience.

In the education of migrant children there are three needs which must be met by school districts and the state educational system in order to remedy their continued failure. These are adaptability, comprehensiveness, and resources.

The entire educational structure must be revamped in order to make it compatible with the characteristics of disadvantaged, minority and migrant children. The revamping must go beyond coloring pictures of children in textbooks brown or black and labeling it the "multicultural series". Change must be made in institutional philosophies, administrative policies, scope and sequence, the curriculum, the extra-curriculum, staffing, student personnel services, non-instructional needs, community involvement, and evaluation.

Educational responses to the characteristics of disadvantaged, minority, and migrant children must be comprehensive. The piecemeal effort now exerted by local, state and federal agencies does little to remedy the existing situation. The migrant child does poorly in school not because he is mobile, nor because he is poor, nor because he is culturally and linguistically different. He does poorly because he is mobile and poor and culturally *and* linguistically different. All of these characteristics, which are perceived as negative attributes by society, are expressed by the schools, and learned by the child.

School systems require the necessary financial and personnel resources for coping with this problem. The imposition of financial penalties in addition to already existing financial constraints further aggravates the problem and will assure its perpetuation.

Until a comprehensive change in educational practices is brought about, this unfortunate segment of our society will continue to be denied equality of educational opportunity.

FOOTNOTES

1. "Evaluation of Migrant Education in Texas," conducted by the Southwest Educational Development Laboratory, Austin, Texas, 1968.

2. For a complete discussion of the Title I Migrant Program, see Masurofsky, pp. 11 to 23, in this issue.

3. Documented in "Evaluation of Migrant Education in Texas," supra and subsequently reinforced by the author's personal observations in San Antonio, Texas, 1969–1973.

4. See, for example, Masurofsky, pp. 11 to 23, and note 56, in this issue.

5. "Texas Evaluation," *supra.*

6. 414 U.S. 563 (1974).

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The Title I Migrant Program:

Passivity Perpetuates a Non-System of Education for Migrant Children

by Mark Masurofsky

Introduction and Background

At least three million people in the United States subsist on migrant and seasonal agricultural work, many of whom, at one time or another, travel the major migratory "streams" from California, Texas and Florida in search of seasonal jobs in agriculture.[1] High mobility, extreme poverty, substandard living conditions, and the hostility of officialdom have constituted their plight since the post-Civil War years.

The present annual migration patterns have developed largely since the Civil War in response to the needs of agriculture for short-term seasonal laborers. Migrant workers are employed in virtually every state. However, three "base" or "home" states—Texas, Florida, and California—have the greatest number of migratory families for the longest periods of time each year.

After leaving the base states, most migratory families travel north along one of the three major migratory streams. From Texas, Mexican-American migrant families typically follow the oldest and largest "central" stream either to the northeast through Arkansas and Mississippi to the Great Lakes states or to the northwest through New Mexico, Colorado, Wyoming, and Montana. The majority of migrant workers in the "western" stream are also Mexican-American. They generally travel from California and Arizona to Oregon and Washington. In the east, a migrant work force made up largely of Blacks and Puerto Ricans follows the eastern seaboard through the Carolinas, Virginia, Pennsylvania, New Jersey, Connecticut, New York and into upper New England. In addition to the three "base" states, there are thirty-five states in which substantial numbers of migrants reside for periods of from three to six months each year. Migrants are commonly employed for shorter periods of time in ten other states.

The patterns of movement of many migratory families, however, are not confined to these three established routes, but vary widely according to where they can find seasonal agricultural work. Some families move only within one state, i.e., on an "intrastate" basis.

Migrant children are particularly victimized by these conditions. They have been regarded as the most severely neglected of all disadvantaged children because they are often unable to take advantage of even such basic services as elementary education. Without education they have little opportunity to break out of the migratory agricultural labor patterns of their parents' generation.

The majority of migrant children are Spanish-speaking and in need of bilingual education. They are usually behind grade level in school,

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Mark Masurofsky gathered information for this article while serving as a research intern at the National Lawyers' Committee for Civil Rights Under Law. *Grateful acknowledgement is made to David Long, Director of the School Finance Reform Project and Rosemary Batt, research associate in the Title I Project of the Lawyers' Committee, for their assistance in the preparation of this article.*

and the average gap between them and other children their age widens from less than six months in kindergarten to two to three years by the time they reach high school.[2] As a result, they frequently drop out before completing high school; whereas eighty percent of all children in this country reach twelfth grade, only twelve percent of the migrants get that far.[3]

Furthermore, their need for education and technical training is even greater today than in the past. Due to increasing mechanization in the agricultural industry, the number of migratory farmworkers employed in this country has decreased significantly from 1965 to 1975.[4] With less agricultural work available, migratory children increasingly must find employment outside "the stream" and adjust to a completely different environment and lifestyle. Basic educational services to help them adapt to these conditions have often been overlooked. The few public funds available for migrant services are frequently used for more immediate health, nutritional, and medical problems.

Beside such basic problems as identification, recruitment, and transportation of migrant children, late entry into schools, and poor attendance rates, there are numerous difficulties for those migrant children who are in school. For example, their special needs are easily overlooked in regular classrooms; school personnel frequently do not understand their special educational needs; and their educational experiences are seldom coordinated as they move from school to school.

Only in the last ten years has a national commitment been made to improve the education of migrant children. Prior to that time, general social services for migrants, including education, were provided largely through the efforts of concerned citizens, church groups, and voluntary and professional organizations. In the 1930's, for example, religious organizations such as the National Friends Society, the National Council of Churches, and the Catholic Rural Life Conference called attention to the need to provide services to migrants and helped sponsor part-time summer schools and day care centers at the local level. Until the 1940's and 1950's, state and federal agencies did not even begin to focus on the problems of migrants in any signficant way. Little other than the appointment of committees came out of this period. In 1956, for example, the President's Committee on Migratory Labor was established under the Department of Labor which led to the establishment of a Governor's Committee on Migratory Labor in some thirty-five states by the early 1960's. However, federal funding for programs to improve the conditions of migrants was not available until the 1960's. In 1962, the Migrant Health Act was passed providing funds for health care to migrants;[5] in 1964 Congress passed Title III-B of the Economic Opportunity Act to assist migrant families by providing them with day care centers, health and nutritional care, minimum standard housing, and vocational training.[6]

Finally in 1966, Congress amended Title I of the Elementary and Secondary Education Act to provide categorical aid for educating migrant children.[7] The Title I migrant program is the only federal program designed expressly to provide special educational services for migrant children at the elementary and secondary levels. Congressional support for the program has increased consistently since 1967. In nine years, appropriations for the program have increased from $9.7 million in 1967 to $97 million in fiscal year 1976. Similarly, children served by the program have risen from 78,000 to 413,000, for the same period. The number of migrant children currently registered in the "Migrant Student Record Transfer System" is 680,000.[8]

The purpose of this article is to review the basic legal requirements for the Title I migrant program (Part I) and to discuss certain problems that have occurred in carrying out the program and why they persist today (Part II).

I. The Legal Requirements for Title I Migrant Programs

In 1965 Congress enacted Title I of the Elementary and Secondary Education Act to provide federal funds for programs and projects designed to meet the special educational needs of educationally deprived children living in school attendance areas where there is a high incidence of poverty.[9] In passing the Title I Act, Congress recognized that there was a strong relationship between economic and educational deprivation. Consequently, Title I was intended to provide

compensatory education to children who are behind grade level in school or "whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large".[10]

The original 1965 Act made no special provision for children of migrant families. However, nationwide, the average annual income of migrant families is below the poverty level,[11] and by adolescence, migrant children are frequently two to three years behind the grade level of other children their age. Consequently, virtually all migrant children are eligible to participate in basic Title I programs operated by local education agencies.

Recognizing the unique problems and disadvantages that are inherent in the condition of migrancy, Congress amended Title I in 1966 to provide a special "set aside" to "establish or improve" special education programs for migrant children. The set aside was intended to fund only those programs and projects "which are designed to meet the special educational needs of migratory children of migratory agricultural workers".[12] Migrant children, however, continue to be eligible to participate in "basic" Title I programs operated by local education agencies. Indeed, Congress subsequently emphasized that, wherever possible, migrant children are to be served under the basic Title I program and that services provided under the migrant program and the basic program are to be coordinated to avoid duplication of services.[13]

A. Title I Migrant Program Requirements

The legal requirements for operating Title I migrant programs differ from those of the regular Title I program in at least three important ways. These differences reflect the interstate nature of migrant education and the particular needs of migrant children.

First, as a categorical program with strict eligibility requirements, only migrant children are eligible to receive services under the Title I migrant

Photo by Bill Cronin, courtesy of the New York State Migrant Center

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program. These funds are intended to focus on particular migrant education problems such as the difficulty migrant children have in adjusting to the education system and their need for bilingual education. The number of migrant children eligible to participate in the Title I migrant program has been increased by Congress steadily over the last nine years. Initially, the only children eligible were those who had migrated with their parents in search of seasonal agricultural work at some time during the previous year. In 1967, Congress expanded the definition of a migrant child to include one who had travelled with his or her parents in search of agricultural work during the previous five years. This includes a child who had recently "settled out" of the stream.[14] In 1972, the program was expanded to include services to preschool migrant children;[15] and in 1974, Congress included the children of migratory fishermen.[16]

A second difference from the basic Title I program is that migrant funds are to be used to coordinate migrant programs among school districts and states to promote educational continuity for migrant children as they move from place to place.[17] Such coordination includes the transfer of pertinent information (e.g., health and education records) from the base state, where the migrant child may spend a number of months, to "receiver" states, where the child may spend only a few weeks each year.[18] In response to the need for an accurate and efficient method of maintaining migrant student records, some Title I funds have been used since 1969 to develop a computer-based "Migrant Student Record Transfer System". Since 1972, the system has been operating in 48 states.

A third difference is that in applying for Title I migrant funds, states must show that Title I migrant programs have been adequately coordinated with programs for migrants operated under Title III-B of the Economic Opportunity Act.[19]

In addition to these three provisions, the act requires that Title I migrant programs be operated "consistent with the basic objectives of Title I".[20] In other words, migrant programs must follow the categorical aid requirements for all Title I programs. As outlined in the law and detailed in regulations issued by the Office of Education, Title I funds may not be used to provide "general aid" to school districts or schools;[21] and state and local Title I officials must follow certain procedures to ensure that Title I funds are spent solely to meet the needs of target groups of children. These procedures require education officials, (a) to assess the needs of the Title I eligible children (in this case, migrant children) with the use of objective tests and parent and teacher evaluations;[22] (b) to establish goals and objectives to be met during the project;[23] (c) to design projects to meet the specific needs of the children;[24] and (d) to evaluate annually, (according to "specific performance criteria related to program objectives") the effectiveness of the program in meeting the special educational needs of the children being served.[25] The act also provides for the participation of migrant parents and the in-service training of teachers and teacher aides.

The Title I act restricts the use of Title I funds (including Title I migrant funds) in two other significant ways. Title I funds are to provide *supplementary* educational services over and above those normally provided to all children with state and local funds.[26] They are not to *supplant* or replace funds for educational purposes. Second, Title I funds are to be *concentrated* in programs of "sufficient size, scope, and quality to give reasonable promise of substantial progress" toward meeting the special educational needs of the children being served.[27] As a guideline for the concentration requirement, the Office of Education has stated that those children most in need should be served first. It has also recommended that the minimum Title I per pupil expenditure be one-half the average per pupil expenditure for general education from state and local funds.[28]

In 1972 Congress amended Title I to require that migrant funds be concentrated on those children who are "currently" migrant and therefore most in need of services. Members of Congress noted that "when migrant children are not in actual migratory status, it may be more appropriate that they participate in the basic projects (i.e., those not funded from the migrant set-aside), and that the funds from the migrant entitlement are intended to be concentrated on projects serving children who are actually in a migratory status.[29]

B. The Administrative and Enforcement Scheme

The administrative and enforcement scheme

for the Title I migrant program differs from that of the basic Title I program in several significant respects. Reflecting the interstate nature and national scope of the task of educating migrant children, the law places primary responsibility for operating and administering the Title I migrant program with state and federal officials, rather than with local school officials who otherwise often function semi-autonomously. Unlike the basic Title I program that delegates broad discretionary responsibilities to local officials for operating Title I programs, the migrant program is designed by and operated directly through, the state education agency (SEA). The state may, at its discretion, operate Title I migrant programs in any of three ways: (a) directly through its own agency; (b) through local education agencies (LEAs); or (c) through private, nonprofit agencies. The third option has been used rarely. No matter which option is taken, however, the state must insure that Title I migrant projects are operated in compliance with the program requirements described above.[30]

The state's annual allotment of Title I funds is determined by a formula based on the number of migrant children, aged 5–17, residing in the state full or part-time.[31] The administrative tasks the state must perform in order to properly use these funds include selecting "target areas" for the Title I migrant program according to which geographic areas have "high concentrations of migrant families" in the state, reviewing and approving applications from local education agencies and private nonprofit organizations, allocating Title I migrant funds to agencies upon project approval (if the state does not run the program itself), and coordinating Title I migrant programs with other state and federal programs.[32]

The state's discretion in administering the Title I migrant program is great. Unlike the basic Title I program for which the vast majority of school districts have grant entitlements, the allocation of Title I migrant funds is at the complete discretion of the state. The state determines which geographic areas to target. The state may approve or disapprove an application, at its option, or "by-pass" the local education agency and set up a project operated directly through the state. Under the Title I migrant program disapproval of a local district's project application triggers no hearing process. This is in contrast to the basic Title I program under which the local education agency must be given a hearing if its application is disapproved by the state.

The state's administrative oversight responsibilities for the Title I migrant program are also significant. The state must provide technical assistance and disseminate information to project directors; and it must "constantly monitor" the Title I migrant projects[33] and evaluate their effectiveness annually. If any violations of program requirements occur, the state is accountable for the illegal use of program funds. Consequently, the state must audit the Title I migrant projects regularly to ensure that funds have been used only to meet the needs of migrant children and that separate migrant program records and reports are available to document the proper use of funds.[34]

In addition to the delegation of major administrative responsibilities to states for the Title I migrant program, Congress also gave the U.S. Commissioner of Education substantial authority for giving direction to the Title I migrant program, coordinating program activities between states, and, if necessary, intervening in the states' administration of the program to ensure that migrant children receive the services to which they are legally entitled. In enacting the migrant amendment to Title I in 1966, Congress intended the Office of Education to exercise strong leadership "... in bringing states together to coordinate services and programs so that continuity of education of the children is achieved."[35] In recognition of the interstate nature of migrant education, the law gives the U.S. Commissioner of Education even greater administrative responsibility for the proper use of Title I migrant funds than for funds under the basic Title I program.

Under all Title I programs, the Commissioner of Education is responsible for determining and distributing grants to states according to the Title I formula;[36] promulgating regulations and guidelines consistent with the law, and upon request, providing technical assistance to state and local officials to clarify those requirements;[37] monitoring and auditing to ensure state and local compliance with program objectives;[38] and enforcing the law and his or her own regulations and guidelines by withholding funds from noncompliant state

Photo by Bill Cronin, courtesy of the New York State Migrant Center

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and local governments.[39]

Under the migrant program the Commissioner must perform other responsibilities as well. First, states must submit a detailed application (including all state-approved school district projects), describing the entire statewide migrant program for Office of Education approval. In contrast, under the basic Title I program, USOE approves state programs based only on assurances that the program will be operated in compliance with the law. Second, the Commissioner has the discretion to *by-pass* a state agency in the distribution of Title I migrant grants and "make special arrangements" with other public or nonprofit private agencies so that migrant children receive the special educational programs to which they are entitled. The Commissioner may invoke this by-pass provision under one of three conditions: if a state is "unable or unwilling to conduct" Title I programs for migratory children; or if the Commissioner determines that by-passing the state agency "would result in more efficient and economic administration" of the program; or if it "would add substantially to the welfare or educational attainment" of migrant children.[40] Unlike the withholding of funds to enforce compliance with Title I, the alternative by-pass provision allows the Office of Education to enforce program requirements without running the risk that the migrant program involved will be cut back.

II. The Failure to Meet the Needs of Migrant Children

Federal funding for the education of migrant children began in 1966 because such children had too often fallen between the cracks of local school districts and state education systems and because the solution to this problem demanded national direction and interstate coordination. Consequently, to receive funds under the Title I migrant program, states and local school districts have been required to design programs that meet the special educational needs of migrants and to coordinate their efforts with those of other states that serve the same children. Responsibility for overall direction and coordination was given to the U.S. Office of Education. This, at least, is the structure established in the legislation. In this section, we will consider the extent to which problems in the administration of the Title I migrant program have prevented migrant children from receiving the benefits which the legislation intended them to have.

The sources we have used in this analysis consist primarily of documents either prepared by HEW or under contract with HEW. These include audits of state Title I migrant programs prepared by the HEW Audit Agency and annual program reviews done by the Office of Education. In addition, a study of the impact of the Title I migrant program was completed in 1974, by Exotech Systems, Inc. under USOE contract. Due to the "official" nature of our sources we believe that the problems are likely to be even more serious than reported here.

This analysis is organized according to three general problem areas: (1) the failure to identify and serve eligible migrant children, (2) the failure to design adequate (and lawful) educational programs to meet the special needs of migrant children; and (3) the Office of Education's inadequate administration of the Title I migrant program.

A. Identifying and Serving Migrant Children

The responsibilities of education officials in the administration of the Title I migrant program have been well defined since its inception. Yet state and local officials have frequently failed to adequately identify and serve migrant children, thereby frustrating the major purpose of the program which is to meet the special educational needs of such children. Initially this may have been the result of inexperience. However, the continuing failure to identify and serve migrant children results from the use of these funds to serve ineligible children and from a lack of effort by education officials to obtain complete and accurate information on the children they are serving.

Guidelines issued by the Office of Education in 1966 identified a migratory child of a migratory agricultural worker as:

> "a child who has moved from one school district to another during the past year with a parent or guardian who was seeking or acquiring employment in agriculture including re-

lated food processing activities such as canning."[41]

Subsequent guidelines issued by USOE (a) distinguished between *currently* migratory children, as defined above, and *formerly* migratory children (those who have "settled out" of the migrant stream within the last five years) and (b) provided that currently migratory children should be served first.[42]

Evidence indicates that many migrant children are not served by Title I migrant programs. For example, HEW auditors in 1971 found that certain counties in Oregon with high concentrations of migrant children received no Title I migrant funds while other counties were using migrant funds to serve ineligible children.[43] A later report, issued in 1973 by the General Accounting Office, found that in the state of Washington less than 25% of the migrant children whose records were reviewed received special educational services under Title I.[44] And in one Florida district, only 21% of the Title I eligible migrant children were receiving special educational services.[45]

> The GAO report futher disclosed that: "some school districts which enrolled substantial numbers of migrant children were not participating in the migrant education program because they were unaware of the program, were unaware that migrant children were enrolled in their schools, or were unwilling to participate because of the additional paperwork."[46]

Yet it is the responsibility of state education departments and the Office of Education to ensure that such migrant children have an opportunity to participate.

Even though large numbers of migrant children are not being served, ineligible children and children who have not been identified as eligible have been and continue to be served by the program. For example, HEW auditors estimated that in 1970 as much as two million dollars in federal migrant funds may have been improperly spent on non-migrant children in New Jersey.[47] In Mississippi, approximately $545,000 or 80% of the 1971 Title I budget was spent on projects for ineligible children or for children whose eligibility could not be determined.[48] And in Arkansas, over $120,000 was illegally spent to serve non-migrant children in 1971 and 1972, according to HEW auditors.[49] More recently USOE review teams found, during 1974-75 site visits to Connecticut, Maine and Pennsylvania, that information was not available to determine whether participants in projects were eligible children of migratory workers.[50]

This carelessness in identifying and serving migrant children in need of special educational services has been documented throughout the program's history. All twenty audits of Title I migrant programs conducted by the HEW Audit Agency, for example, have found that ineligible children have been served by these programs; and 60% (over $3 million) of the illegal expenditures of Title I migrant funds disclosed by HEW auditors were attributed to state and local violations of Title I eligibility requirements. Recently, the HEW Audit Agency conducted a "follow-up" review to determine whether program violations, previously discovered by the audit agency, had been corrected. It found that eligibility violations continue to be a problem in the Title I migrant program.[51]

The Migrant Student Record Transfer System, which was established in part to maintain accurate records of migrant children in the program, does not solve the problems resulting from the failure to identify and obtain complete information on migrant children in the first instance.[52] Furthermore, there is no information available on what percentage of migrant children this system actually includes.

In brief, states and school districts often have not taken adequate responsibility for identifying migrant children to receive Title I services and seeing that they are served; they also have failed to keep accurate records of program participants—records which are particularly important for serving a mobile student population. Moreover, the Office of Education has not issued any uniform procedures for identifying program participants.

B. Meeting the Special Needs of Migrant Children

Title I migrant funds are intended to provide supplementary educational services to meet the special educational needs of migrant children. To

be supplementary, they must fund services over and above those normally provided with state and local funds. To meet the special needs of migrants, programs must be designed to accomplish specific goals and objectives based on an assessment of the needs of migrant children; and the effectiveness of programs must be evaluated annually. There have been serious deficiencies in all of these aspects of program design.

1. Supplanting

Rather than being supplementary, Title I migrant funds frequently have been used to provide general aid to districts or merely to make up for the failure of states and school districts to provide adequate services for migrant children. Supplanting violations may occur in at least two ways: (a) if Title I migrant funds are used to provide services to migrant children which were previously provided with state and local funds; (b) if they are used to provide services to migrants that are provided to non-migrant children with state and local funds. In addition, migrant children must be given *access* to the basic Title I program *comparable* to that available to other Title I eligible children.

HEW auditors have found numerous cases of Title I migrant funds being used by school districts for general educational purposes. In Arizona, for example, school districts used migrant funds to pay for general purpose teacher aides, to provide general film libraries, and to construct and remodel regular classrooms between 1968 and 1970.[53] Several Arkansas school districts which HEW auditors reviewed illegally paid for a recreation program, a general shop program, and a general kindergarten program with their federal migrant grants. One district did not even make an attempt to provide special services to migrant children. Other Arkansas districts were found to have used Title I migrant funds to supplant state and local funds; in one case these federal funds paid the costs of a study hall for migrant children that was identical to the general study hall in which other children were placed; in another case, Title I funds were used by a district to pay for part of the salary of a regular guidance counselor who provided no services to migrant children over and above those provided to other children.[54] In North Carolina large purchases of audiovisual materials were made from migrant funds ostensibly for a Migrant Education Center, but most of these materials were then issued to schools and universities not serving migrant children.[55] And in two out of the four Florida districts audited by HEW in 1971, teachers and teachers' aides funded under the migrant program were being used as general classroom teachers and aides.[56]

A large scale survey of migrant education conducted during the same period as these audits also provided evidence that the use of Title I migrant funds for general education aid is a widespread problem. It found that in a substantial number of districts, federal funds were used to pay for 100% of such general educational expenditures for migrant children as teachers' salaries.[57] And more recently, USOE review teams have found instances of general aid violations, as for example, in a recent program review of a South Dakota district where staff and equipment funded with Title I migrant funds were found being used for general purposes.[58]

We suspect that supplanting is a greater problem than these examples would indicate. The temptation to use Title I funds to pay for regular educational services, which non-migrant children receive from state and local revenues, is particular-

Photo by Bill Cronin, courtesy of the New York State Migrant Center

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ly great in the Title I migrant program because states frequently fail to provide adequate support to local districts for the education of migrants. State education aid formulas often do not adequately take into account the migrant children attending a local school district. Furthermore, local districts frequently feel little responsibility for the education of migrant children whose parents do not vote or pay taxes in the district and who leave the district before the end of the term. Consequently, there is a natural tendency for local officials to rely heavily on the Title I migrant program to meet all the needs of the migrant children.

Moreover, the Office of Education has not adequately studied or responded to the problems of Title I migrant funds supplanting state and local funds. Indeed, USOE does not even regularly collect the information which would permit it to make determinations that states and school districts are using Title I funds to provide supplementary services.

2. Designing Title I Projects

The United States Office of Education has established eleven national goals for providing services to migrant children under the Title I migrant program. These include, for example, providing preschool education and kindergarten, building migrant children's communications skills and developing programs in language arts, math, and social studies, and in pre-vocational and vocational training. They also include providing a broad range of support services for migrant children, (medical, nutritional, psychological), coordinating Title I services among districts and states, and involving migrant parents in the education of their children. These goals give some general direction to the Title I migrant program, but it is not self-evident how these goals are to be met. Nor are these abstract goals a substitute for the needs assessment required in the design of each Title I project: they provide no guidance concerning the priority needs of particular migrant children.

The legislation establishing the Title I migrant program clearly sees the education of migrant children as an interstate and national concern; however, the actual designs of Title I migrant programs seldom reflect this concern. The Office of Education has not established any uniform procedures for assessing the needs of migrant children, and no accurate needs assessment has been made at the national level;[59] nor does USOE appear to have done much to coordinate the designs of migrant programs in the states in which the same or similar children are likely to attend school; for example, to try to ensure that the migrant program in a receiving state like Michigan is coordinated with and supportive of the program in a base state like Texas. State applications for migrant education funds usually incorporate the national goals with little embellishment, and state education agencies themselves appear to have done little to ensure that the services they provide migrant children mesh with those provided in other states.[60] The Office of Education has approved states' application for migrant funds that contain only vague statements, if any, of the specific needs of migrant children the state program is designed to address.

In practice, programs are typically designed by local school districts with little guidance from the state.[61] This has often given local officials a free hand to design programs as they see fit; local needs and priorities rather than the needs of the migrant children to be served tend to dictate what services will be provided. As a result, some of the most critical needs of migrant children appear to be overlooked. A recent study of the impact of the Title I migrant program found, for example, that Florida districts provided no bilingual instruction even though many migrant children were Spanish-speaking, and that elsewhere, the provision of bilingual education was largely without continuity. It further found that few districts provide preschool programs for migrant children, even though this is a national goal.[62] It noted that the lack of preschool services may be one reason why migrant children "get a late start" and never catch up in grade level to other children their age.[63] The same study found that reliance on local planning frequently results in needless duplication of services, particularly in health care; and that in trying to be "ready for anything", projects offer a smattering of everything to migrant children without concentrating on their special educational needs.[64] Even if programs at one local project are adequately developed to meet the needs of migrant children,

there is little assurance for those children that the services they received at one project will be continued at another project in that state or another state.

Similar failures of national coordination have prevented Title I migrant programs from being adequately evaluated. A report by the General Accounting Office in 1973 found that:

> "Although annual evaluations of migrant education programs are required to be made, the Office of Education has not developed a systematic approach for evaluating the overall impact of the numerous migrant education programs."[65]

In 1974, a "follow-up" review of the Title I migrant program by the HEW Audit Agency reached a similar conclusion: although a 1972 audit report informed the Office of Education of the need to strengthen the migrant program's evaluation system, no action had been taken by that agency to correct this weakness.[66] As a result, there is little coordination between states and within states in evaluating how well migrant children are progressing. One state will use one pre-test while another state will use an imcompatible post-test with the result that the actual achievement of children cannot be evaluated. Moreover, the Migrant Student Record Transfer System does not adequately solve these problems of coordination because it only reflects the hodge podge of needs assessment and program evaluation techniques used among the various projects serving migrant children.

Cartoon by David Sipress

C. The Office of Education's Administrative Failures

It is difficult to know why after nine years there continues to be such widespread failure by federal, state, and local officials to identify migrant children for the program, to assess their needs, to design coordinated education programs to meet these needs, and to evaluate systematically the effectiveness of migrant program. Because migrant education was long neglected by state and local education agencies, the federal initiative to overcome this neglect has required active leadership and enforcement by the Office of Education—particularly since the education of migrants extends across state lines. Unfortunately, the Office of Education by its passivity has allowed the fragmented non-system of migrant education to continue. It has typically passed out funds to states absent clear program guidelines and without requiring state and local adherence to major program requirements.

The HEW Audit Agency has conducted twenty audits of the Title I migrant program. These audits document that nearly $5 million of Title I migrant funds have been misspent.[67] However, the Office of Education has taken little action to correct problems discovered through program audits, even in cases of clearly documented program violations involving substantial amounts of funds. The Lawyers' Committee recently reviewed all of the HEW audits of the Migrant Education Program and found that the Office of Education sought reimbursement for less than ten percent of the $5 million in improper expenditures documented by HEW auditors; and less than one percent of that total was ever

recovered. Even discounting the $5 million for possible overzealousness or incorrect interpretations of the law by HEW auditors, the Office of Education's response to the massive documentation of illegal expenditure of Title I migrant funds appears totally inadequate. What better encouragement for a state or district to disregard program requirements than to be caught "red handed" and have federal officials do virtually nothing about it?

The collection of reimbursements from states for illegally spent funds may, of course, result in political pressure being directed against USOE action. Where reimbursement is required, states must use their own funds to make repayments for misspent Title I funds. However, fund reimbursement is not the only alternative for enforcing the Title I migrant requirements. The Commissioner can by-pass the states and local school districts in funding migrant programs and contract with other agencies to provide migrant education. The by-pass provision could be a powerful instrument where states fail to provide an adequate education for migrant children, yet it has never been used.

Furthermore, only twenty states have been audited by HEW during the nine years of the migrant program, even though forty-eight states actually participate in the program. Equally significant is the absence of any completed audits after 1972 (and only one was completed in that year). More recent information on state programs has been obtained from USOE on-site reviews of Title I migrant programs. In most cases, however, these reviews are sketchy and of limited value in diagnosing problems in existing programs. This has meant that the Office of Education has been without good documentation on state and local compliance with program requirements for nearly the past four years.[68] This failure to audit in recent years is particularly striking in light of the extent of violations of legal requirements found in earlier audits.

The Office of Education's laxness in administering the Title I migrant program is also reflected in its failure to issue comprehensive guidelines explaining how the program actually should work. HEW's own auditors found that, in 1972, USOE had not yet compiled adequate guidelines for the program and recommended that guidelines be developed as soon as possible. The Office of Education responded that "a complete set of migrant program guidelines and advisory statements has been prepared by the Migrant Programs Branch . . ."[69] In fact, no comprehensive guidelines were ever issued.[70] Nor has USOE issued handbooks and manuals to local officials providing them with technical assistance in the operation and administration of the program.

Another indication of the low priority of migrant education in the Office of Education is the size of the staff assigned to administer the program. Adequate resources and personnel to operate the Title I migrant program have been lacking since the program's inception. Only seven professional staff members are responsible for reviewing and approving applications, issuing regulations and guidelines, providing technical assistance to states, coordinating interstate Title I migrant programs, and monitoring and enforcing compliance with the requirements of the act. A 1972 HEW audit of USOE's administration of the migrant program recommended a significant staff increase; the Office of Education said that it would study the problem.[71] No additional staff, however, has been added. Congress also noted that:

> ". . . the Office of Education must provide proper resources and personnel for the migrant program division of USOE. This has not been the situation to date."[72]

We are reluctant to assign great significance merely to the number of staff working full-time on migrant education. However, in a structure as large as HEW it provides some measure of organizational priorities.

In 1971 the National Committee on the Education of Migrant Children conducted a nationwide study of the Title I migrant program. As of the fifth year of the program, it concluded that "USOE is performing a funding function but has little knowledge of how the funds thus granted are being spent".[73] Since that time, federal audits and program reviews have disclosed numerous instances of deficient migrant education programs. In spite of the additional information concerning the problems of the program, USOE has remained largely passive.

The Title I migrant program was the first nationwide effort to improve the education of migrant children. In contrast to the previous pattern of neglect, federal program requirements were intended to insure that migrant children received a nationally coordinated program of education appropriate for their needs. Undoubtedly, the Title I migrant program has increased the educational opportunities for migrant children as a whole. However, federal, state, and local failures in the identification of migrant children and their needs, in the design and coordination of projects to meet those needs, in the evaluation of migrant education projects, and in the administration of the program at all levels has meant for many migrant children the continuation of the haphazard and disjointed education they received prior to the enactment of the Title I migrant program.

FOOTNOTES

1. The most recent estimates at the Department of Labor are 1.4 million seasonal farm wage workers (those who have worked in agriculture between 25–249 days in one year) who have 1.7 million dependents (under 18 years of age). Seasonal farm workers include both migratory and non-migratory workers; however, many seasonal non-migratory workers may be former migrants. This figure also omits migratory workers who are employed more than 249 days per year. "Selected Farm Wage Worker Households and National Farm Worker Programs," Economic Research Service, Dept. of Agriculture, October, 1975.

2. "Evaluation of the Impact of ESEA Title I Programs for Migrant Children of Migrant Agricultural Workers", Vol. II, Exotech Systems, Inc., January 25, 1974, pp. II–10, 11, 13. (hereinafter "Exotech Impact Study").

3. *Ibid.*, p. II–18.

4. "Selected Farm Wage Worker Households and National Farmworker Programs," Economic Research Service, Department of Agriculture, October, 1975.

5. 42 U.S.C. 242h.

6. 42 U.S.C. 286l *et. seq.*

7. 20 U.S.C. 241a *et. seq.*

8. Statistics prepared by the Title I Migrant Branch, Division of Education for the Disadvantaged, United States Office of Education (USOE). The "Migrant Student Record Transfer System" MSRTS is discussed *infra* at pages 14 and 18.

9. 20 U.S.C. 241a *et. seq.*

10. 45 C.F.R. §116.1 (i).

11. A study issued by the Manpower, Evaluation and Development Institute, Inc. in April, 1971, found that the average annual migrant family income was $2,021, the average number of family workers was 2.3 and the average family size was 6.4. At the time of the study, the OEO established poverty level was $4,800 for a family of six.

12. 20 U.S.C. 241e(c)(1)(A), as enacted. The act was amended in 1974 to include the children of migratory fishermen. 20 U.S.C. 241c–2(a)(1)(A).

13. Senate Report No. 91–634, *2 U.S. Code Cong. and Admin. News*, (1970), p. 2780. See also, USOE Program Information Guide No. 128, February 9, 1968.

14. 20 U.S.C. 241c–2(a)(3), as amended.

15. 20 U.S.C. 241c–2(a)(1)(D), as amended.

16. 20 U.S.C. 241c–2(a)(1)(A), as amended.

17. *Ibid.*

18. *Ibid.*

19. 20 U.S.C. 241c–2(a)(1)(B), as amended.

20. 20 U.S.C. 241c–2(a)(1)(C), as amended.

21. 45 C.F.R. §116.17(g).

22. 45 C.F.R. §116.18(b); 45 C.F.R. §116.17(k).

23. 20 U.S.C. 241e(a)(7); 45 C.F.R. §116.18(b).

24. 20 U.S.C. 241e(a)(1)(A), 20 U.S.C. 241c–2(a)(1)(A); 45 C.F.R. §116.17(a).

25. 20 U.S.C. 241e(a)(6), (7); 45 C.F.R. §116.22.

26. 20 U.S.C. 241e(a)(3)(B).

27. 20 U.S.C. 241e(a)(1)(B).

28. Program Guide 44, §4.7.

29. Senate Report No. 91–634, 2, *U.S. Code Cong. and Admin. News* (1970), p. 2780.

30. See generally 20 U.S.C. 241c–2, as amended, see also "State Programs for Migratory Children, Title I, ESEA, Program Information Guide No. 35, issued February 3, 1967, p. 1.

31. 20 U.S.C. 241c–2(b). This number is multiplied by 40% of the state or national average per pupil expenditure, whichever is higher. No state allocation, however, may be based on less than 80% or more than 120% of the national average per pupil expenditure.

32. *Op. Cit.*, Program Information Guide No. 35, pp. 1–4.

33. 45 C.F.R. §100b.431.

34. 45 C.F.R. §100b.301(h)(1) and 477. Under the General Education Provisions Act of 1972 (GEPA), administrative and fiscal management procedures for all federal education programs were consolidated. See generally 45 C.F.R. §100b.1–495.

35. House Report No. 1814, 3 *U.S. Code Cong.*

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and Admin. News (1966), p. 3853.

36. 20 U.S.C. 241g.

37. 20 U.S.C. 1232, 20 U.S.C. 241e(a), and 20 U.S.C. 1231c, respectively.

38. 20 U.S.C. 241f and 45 C.F.R. §100b.436.

39. 20 U.S.C. 1232c and 20 U.S.C. 241j, respectively.

40. 20 U.S.C. 241c–2(a)(2).

41. Program Information Guide #28, November 28, 1966.

42. "Title I Migrant Information Pamphlet", OE-37067, 1970; "Advisory Statement on Definitions of Migratory Children and Priorities in the Use of Title I, ESEA, Migrant Funds," HEW/USOE Memorandum to Chief State School Officers, January 13, 1972.

43. "HEW Audit of Oregon Migrant Education Program," HEW Audit Agency, issued September 30, 1971, pp. 8-21.

44. "Impact of Federal Programs to Improve the Living Conditions of Migrant and other Seasonal Farmworkers", General Accounting Office, February 6, 1973, p. 50.

45. *Ibid.*, p. 92.

46. *Ibid.*, p. 28.

47. "HEW Audit of New Jersey Migrant Education Program," HEW Audit Agency, issued June 11, 1971, pp. 4-12.

48. "HEW Audit of Mississippi Migrant Education Program," HEW Audit Agency, issued May, 1972, pp. 4-17.

49. "HEW Audit of Arkansas Migrant Education Program," HEW Audit Agency, issued September, 1972, pp. 14–33.

50. Reports on Title I Migrant Reviews in Connecticut, Maine and Pennsylvania, dated respectively, August 30, 1974, November 12, 1974 and September 17, 1975.

51. "Follow-up Review of Migrant Children Education Program "HEW Audit Agency, December 27, 1974, p. 6.

52. USOE review teams frequently find that education officials fail to complete the MSRTS records. See, for example, reports on program reviews in California (March 6, 1973), North Dakota (August 28, 1974), and New York (April 22, 1975).

53. "HEW Audit of Arizona Migrant Education Program," HEW Audit Agency, issued April 26, 1971, pp. 9-13.

54. "HEW Audit of Arkansas Migrant Education Program," HEW Audit Agency, issued September 27, 1972, pp. 36-40.

55. "HEW Audit of North Carolina Migrant Education Program," HEW Audit Agency, issued May 31, 1972, pp. 12-14.

56. "HEW Audit of Florida Migrant Education Program," HEW Audit Agency, issued April, 1971, pp. 12-14.

57. "Wednesday's Children: A Report on Programs Funded Under the Migrant Amendment to Title I of the Elementary and Secondary Education Act," National Committee on the Education of Migrant Children, (1971).

58. "Report of Title I Migrant Review of South Dakota," conducted by USOE, March 19, 1975.

59. Exotech Impact Study, Vol. 2, III-9.

60. *Ibid.* pp. III-9-13.

61. Recent USOE reviews of Title I migrant programs in North Dakota (August 28, 1974) and Pennsylvania (September 17, 1974), for example found that no statewide procedures had been developed to assess children's needs, develop program objectives, or adequately evaluate programs and that there was a consequent lack of such procedures at the local level.

62. Exotech Impact Study, III-42.

63. *Ibid.* pp. III-37, 53.

64. *Ibid.* pp. III-34, 35.

65. "Impact of Federal Programs to Improve the living conditions of migrant and other seasonal farmworkers", General Accounting Office, February 6, 1973, p. 28.

66. "HEW Follow-up review of the migrant children education programs," HEW Audit Agency, December 27, 1974, Exhibit A.

67. Only a small number of the migrant projects operated under Title I over the past nine years have, in fact, been audited. Further, the scope of the audit procedure is limited to certain aspects of a program or portions of its funds.

68. The Impact Study completed by Exotech Systems, Inc. in 1974 under contract with USOE was not comparable to an audit since it relied largely on a sample survey and was not oriented to determining the extent to which a particular state or district complied with program requirements.

69. *Op. cit.*, HEW Audit Agency, July 21, 1972, p. 13.

70. Revised regulations pertaining to the Title I Migrant Program were issued in proposed form on July 11, 1975. The regulations will probably not be in final form before July, 1976.

71. "Audit of the Migrant Children Education Program Under Title I, ESEA," HEW Audit Agency, July 21, 1972, p. 12.

72. "House Report No. 93-805, 3 *U.S. Code Cong. and Admin. News,* (1974), p. 4114.

73. "Wednesday's Children: A Report on Programs Funded Under the Migrant Amendment to Title I of the Elementary and Secondary Education Act," National Committee on the Education of Migrant Children, (1971).

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Child Labor in Agriculture:

"I hate to pick beans, but I gotta earn my livin'."

by Cassandra Stockburger

An amendment to the Fair Labor Standards Act, passed in 1974, extended the protective coverage of that act to young children working in agriculture outside of school hours.[1] Prior to 1974, children of any age could work in agricultural fields outside of school hours except where prohibited by state law. Under the new provisions children under the age of twelve are not permitted to work at any time on farms which employed more than five hundred man days of labor in any calendar quarter of the preceding calendar year. Twelve and thirteen year olds are permitted to work with written permission of their parents.

Passage of this amendment was a long sought victory for a small group of Congressmen and citizens' groups who had tried for many years to end the use of child labor in agriculture. This victory, however, was short-lived. Farmers in the Northwest, who utilize large numbers of child laborers, immediately challenged the law. On June 22, 1974 a preliminary restraining order was granted in the case of an Oregon farmer, *Larry William Kelly et al* v. *Peter Brennan,* then Secretary of Labor. The Secretary was enjoined from enforcing in Oregon and Washington the new child labor provisions of the FLSA which pertained to the harvesting of strawberries by children under twelve years of age. This order effectively stopped any efforts to enforce the new law in 1974 even though on September 13, 1974 a three judge Federal Court in Oregon upheld the constitutionality of the law and removed the restraining order.[2]

Meanwhile, bills were submitted in both houses of Congress seeking exemptions from the law for children under age twelve if the Secretary of Labor should "find and declare" that they would be working

- outside of school hours and within commuting distance of their permanent residence;
- only in jobs traditionally hand harvested and paid on a piece rate;
- no more than thirteen weeks; and
- at jobs determined not "deleterious to their health or well being".

Major support for these bills came from Washington, Oregon and Maine, three states which have remained dependent on children as a major source of seasonal farm labor.

The House Bill, H.R. 632, although passed by the Sub-committee on Agricultural Labor, was defeated by the House Education and Labor

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Committee in May, 1975. No action has been taken on the Senate bill.

In the meantime serious questions remain about the degree to which employers have obeyed the law and the U.S. Department of Labor has sought compliance with the law. What is clear is that young children did continue to work in the fields in the summer of 1975. A more definitive picture will be available in August of this year when the results of a recent study completed by the American Friends Service Committee is published.

Those not familiar with the child labor question may well wonder why it has been so difficult to eradicate these last vestiges of child labor. It is indeed difficult to understand why agriculture, which along with mining and construction is rated as one of the three most hazardous industries, has been permitted to continue to employ substantial numbers of young children.

It is also difficult to comprehend the degree of educational deprivation experienced by the children of migrant farmworkers, whose families often depend for survival on the income from their labor. This article will explore the connection between child labor legislation and its enforcement and the limited educational opportunities of the children of migrant agricultural workers.

The "Fresh Air" Myth

Work in agriculture has long been surrounded with a mythology which is hard to dispel. This mythology often does not differ from that used to support child labor in industrial jobs in the early part of this century. Where it does differ, however, is in the tendency to romanticize the rural areas and to applaud the independence of the American farmer.

It was as a consequence of this prevalent and long-held belief that farm work is different and that it is safe and healthful that children working on farms were excluded from the first protective legislation on child labor passed in 1938. So prevalent and strong is this belief that even the most able and committed leaders of the fight to end child labor could not bring themselves to act convincingly against child labor on the farms.

A look at the history of the child labor movement shows the ambivalence of such great child labor crusaders as Senator Albert J. Beveridge of Indiana, who introduced the first child labor bill, and of Dr. Felix Adler, chairman of the National Child Labor Committee in 1906. Senator Beveridge, in a 1906 statement on "Child Labor and the Nation," stated

> I myself began physical labor earlier than twelve, hard labor—too hard for any child of eighteen or nineteen. But after all, that was in the open air, in the field, beautiful with waving banners of the corn, and fragrant with the smells of the brown earth, upturned by the plowshare; it was on the grades of railways with great, gross, rough, but vital and kindly men about me, it was in the logging camps, with the majesty of the woods about me. It was bitter work; it was too heavy for any child, but after all, over me by day always was the marvelous blue of God's splendid dome or the glory of his clouds, or over me by night the eternal stars kept their sentinel watch and always there was the pure and unpolluted atmosphere to breathe, and through it all, now and then, was the uplifing influence of the true and the beautiful and good in life.
>
> Any yet in spite of all that, I do not like to think of the years from twelve to nineteen, because it makes me bitter. But suppose my work had not been in the open air?[3]

The same year Dr. Felix Adler, in a speech entitled "Attitude of Society toward the Child as an Index of Civilization," said

> Some strong, robust men who have worked on farms, perhaps worked their way up, have an idea that work is good for little children; but work on the farm is one thing, and work in a cotton mill, especially at night. . . is quite a different matter.[4]

In a report on Child Labor in Agriculture in 1970, the American Friends Service Committee documented the grueling work of children as young as five or six, stooping and crawling in temperatures exceeding ninety degrees for periods up to eight or ten hours a day.[5] Work in the fields was no less exhausting to young children prior to

Photo by Bill Cronin, courtesy of the New York State Migrant Center

1938 and it is hard to understand why this was not evident to the reformers. They too must have known that "all work and no play makes Jack and Jill dull children". They must have understood that time to play and develop physically and intellectually are essential to the complete development of children. Yet, then as now, there seemed to be a tendency to substitute work in the sun and fresh air for play in the sun and fresh air, and to de-emphasize the importance of schooling when it conflicted with the child's ability to contribute to the family income.

In the years since World War II agriculture has become infinitely more hazardous. Gone, for the most part, are the family farms where children worked with and for their parents. Farming operations are now mechanized throughout many phases. Tractors, trucks and harvesting machines are an ever present reality. Accidents are inevitable. Reports of mutilations of limbs, scalpings and the crushing of young children are a part of the grim reality of children in the fields.

Added to the menace of machines is the relatively unknown and unpredictable effect of deadly pesticides which have commonly been used on crops. While there seems to be better control of the use of poisons at the present time it is not yet known what the cumulative effect may be on children who have been exposed to them over a period of time.

Protective Legislation

Children working in agriculture were first brought under protective legislation in 1949, when the Fair Labor Standards Act was amended to prohibit all children from working in the fields during those hours when the school was in session in the district where they lived.[6] This action, while serving to curtail work by a majority of school children during school hours, still permitted children of any age to work before and after school, on weekends, holidays and during summer vacations. However, many children continued to work even during school hours because of lax enforcement. Even more were brought into the

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work force by special accommodations of the school term with the harvest seasons.

The Wage and Hour Division of the U.S. Department of Labor is charged with seeking compliance with the child labor law. By their own admission they cannot do an adequate job because of too few compliance officers assigned to the division. Dale B. Kloak, former Chief of the Child Labor Bureau of the DOL, has said that in any given year only about three to four percent of those establishments covered by the Fair Labor Standards Act were checked.[7] Action on child labor enforcement was largely on the basis of complaints.

The imposition of penalties appears to be rare. Farmers often are reported to get off with a warning. The penalty set for violations of the 1974 amendment is up to $1,000 for each violation.

The same problem of enforcement exists in relation to state child labor laws. Evidence, especially from California which has a law prohibiting work on the farms by children under the age of twelve,[8] indicates that not only are there flagrant violations of the law, but a refusal on the part of the courts to deal adequately with these violations.

Dr. Leo Lopez, Chief of the California Migrant Education Program, estimates that 40,000 children in the state are unrecorded by the schools and other agencies. Many are presumed to be working. Seward Young, a state labor law investigator, has estimated that thirty percent of the 35,000 Wisconsin grape harvesters were children under the age of twelve. One crew was found in the San Joaquin Valley composed entirely of twenty children aged six to fifteen and working under the supervision of one or two adults.[9]

In his book on child labor, *Sweatshops in the Sun*, Ronald Taylor documented several instances where judges, in dismissing cases or refusing to set penalties, have placed responsibility for work on the parents although the law explicitly holds the employer responsible for determining the age of the worker. In another case, a judge stated that "I believe they should allow—not only allow, but foster—the use of minors and juveniles in farm work."[10]

Schools Cooperate With Farmers

The federal child labor law only prohibits children from working when school is in session. While enforcement officers can take children out of the fields they have no jurisdiction over whether the child attends school or not. That is up to the local school district.

Historically, schools in rural areas have cooperated in a number of ways to make child labor available to farmers. School attendance officers in some areas admit to uneven enforcement of school attendance. Some say they just look the other way when older children of needy families are out of school and known to be working. Schools have regularly accepted the responsibility for issuing work permits to fourteen and fifteen year olds.

But of even greater impact on the employment availability of children has been the practice in certain rural areas of scheduling the school term or the school day around the harvest needs of the community so that the children were free to work. In some cases this has meant an interruption in the school term, with schools closed for several weeks during the harvest season.

Most of these practices have now been discontinued although there are occasional reports of school districts delaying the opening of school or accelerating the closing in order to permit children to work. Aroostook County in Maine still has a number of districts which close their schools for three to five weeks during the fall potato harvest. School superintendents cooperate because they believe this to be the will of the community.

Certain Texas school districts operate separate schools for migrant children in which the child is able to fulfill the legal requirements of a 180 day school term in six months. The establishment of these schools grew out of the despair of school officials that parents would return to the state from their migrations in time for the child to

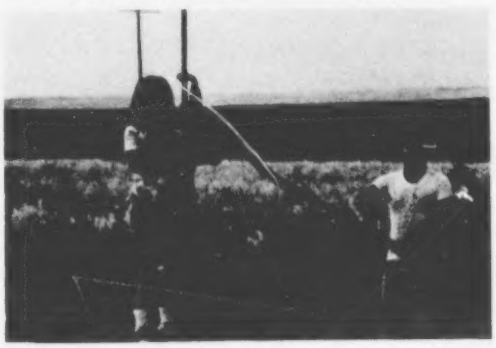

Photo by Eddie Adame

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complete a full term. Although the intent of the schools was to increase the likelihood that the migrant child could get credit for a full term,[11] there were those who felt that on completion of the six month term that the child should then be permitted to work without penalty the other six months of the year. Of course this is not possible under existing law.

It is currently, and has been for some time, the practice of schools in rural areas of Oregon to assist in the recruitment of children to make up platoons of child laborers. Rosters of prospective child laborers are made available at the school to platoon leaders who not infrequently are school teachers. It is the responsibility of the platoon leader to recruit the children for the summer harvest, arrange jobs and transportation and supervise the field work.

The intent of child labor laws to provide not only protection of children from oppressive work but to free them to use their childhood to secure an education is further thwarted by the children and parents themselves. Children are often reported as attending school only enough to avoid a visit from the school attendance officer or visiting teacher. Other families have been known to move from the district if the schools put too much pressure on the parents to keep their children in school. In an environment which does not emphasize the long term benefits of schooling, children often choose to work because they feel guilty about not contributing financially to the family.

Farmers have taken other steps which have made children available for work. Several years ago the Secretary of Labor was prevailed upon not to apply child labor laws to children entering a community after the fifteenth of May. This action was based on the assumption that the children had already finished the school term in their home district or that they could not effectively benefit from enrolling in a new school at such a late date in the year.

In 1970 an attempt was made to secure a similar agreement to cover the first few weeks of the fall school term. However, this effort failed because data was available to show that many migrant children did not return to home base schools until late October or November. It was therefore held essential that they should enroll in the school where they were rather than continue to work until returning south.

Supporting such efforts to side-step the intent of the law has been the argument that the adult workers will not remain in an area where their children cannot work.

Whether or not a child gets an education is inextricably linked to whether or not the child is expected to work. The schools have been charged with providing the single most important alternative to work. Nevertheless there appears to have been relatively little leadership emerging from the education community to support efforts to keep young children out of the fields, even when it entails an interruption in their education.

Is Farmwork Good For Children?

Why is there so much resistance to further restrictions on the work of young children on the farms? Is there any validity to the claims that farm work offers one of the few remaining opportunities for children to learn the meaning of work, to assume responsibility and to learn at an early age the meaning of money? Is it conceivable that certain aspects of modern day agriculture will be unable to continue if child labor is not available? Are there non-hazardous jobs in agriculture in which young children should be permitted to work? Is it possible for children to combine farm labor with adequate opportunities for meaningful educational experiences?

Within the past year all of these questions have been answered in the affirmative by those legislators, farmers, parents and children who have sought ways to continue the legal employment of children under the age of twelve.

Supporters of efforts to end child labor in the fields are equally convinced that young children should not, as a matter of national social policy, be employed in the production of goods for commerce. They argue that jobs in other sectors of our society, such as in offices and stores, are excluded, not because they are potentially hazardous, but because the nation long ago decided that this was not an appropriate role for children. It is argued that the work of children is appropriately in schools or other environments especially designed for their development.

Opponents of child labor believe that the availability of large numbers of seasonal child laborers inevitably depresses wages and deprives adults of jobs. While medical evidence is not conclusive because of the unavailability of long term research, those who oppose all child labor

believe it is safe to conclude that from what is known about the way a child develops physically, farm work is undesirable. The strain on young and undeveloped muscles incurred by the repetitive use of the same muscles over many hours is potentially damaging to the child's growth and development.

Studies of adult farmworkers indicate a high incidence of muscle and joint disease that appears not to be readily explained except as occupationally related. In 1970 a group of doctors examined a large number of farm workers in Texas. These experienced doctors were shocked at the prevelance of diseases to which they could not ascribe a cause. They were especially puzzled by "undiagnosed back, hip and lower extremity pain" in young persons which resembled degenerative osteoarthritis usually found in older people.[12]

Non-Migrants Also Work

Child laborers fall into two main categories. There are the children from poor families who work to supplement the family's basic income and the non-poor, middle class child who works to earn money for his/her own use—a new bicycle, clothes, etc. Among the poor children are those from migrant farmworker families who spend several months each year traveling from one harvest to the next. Other poor children are residents of the area or nearby towns or cities. Many of these are the children of former migratory workers who have settled in the community.

The child labor work force has been estimated to number about 800,000 children under the age of sixteen; one-third of the nation's farm labor work force. Some crops have counted on child labor to make up as high as 75% of their required work force. The Maine Potato Council reports that, in 1974, 13,653 school-age children were employed in the potato harvest. Children made up 62% of the entire work force. Of this number 31.3% were under age twelve.[13]

In the center of the storm over the 1974 Fair Labor Standards Act amendments has been the resident, non-migrant child. Apparently no legislator or community leader wants to appear to be supporting work for migrant children whose lives are known to have been seriously disrupted by child labor in the past. In fact, the exemptions sought by Congressman Lloyd Meeds of Washington in his Bill, H.R. 632, would not have been applicable to migrant children since they would not have been commuting from their permanent residence.

Supporters of the 1974 amendments, while recognizing that poor children suffer more because they are likely to be malnourished and poorly developed physically, have insisted on equal application of the law to all: the poor and the non-poor; the resident and non-resident. They have hastened to point out that to permit resident children to work while denying work to migrant children would work a hardship on migrant families because, short of total elimination of child labor, the wages would not rise to a competitive level.

Further, questions have been raised about the legality of such unequal application of the law.

Education Suffers Most

Meanwhile there are the tragic realities which the nation must face in dealing with the cumulative effects of those years in which little was done to keep children out of the fields. Nowhere are these effects more obvious than in the education of migrant farmworker children.

A 1974 study, carried out for the U.S. Office of Education on the impact of ESEA Title I programs for migrant children, produced some thought-provoking findings in relation to the functioning of these children within the school system, their attitudes and that of their parents toward education.[14]

This study was an attempt to evaluate the results of seven years of special efforts to meet the educational needs of migrant children with supplemental funds from ESEA. This program works not only with the actively migrating child, but with former migratory children who have settled into communities. It is reported to be serving more than 800,000 children.[15]

Major findings of this study which give some insight into the effects of the migratory life style are:

- Migrant students, despite some gains, are still functioning at a lower level than expected for their grade or age group. As they advance in age the gap in grade equivalents expected for their age group continues to widen.
- The average migrant students are from six to eighteen months behind what would be expected of their age group.

- When compared to the student population as a whole a significantly higher percentage of migrant students are enrolled in grades one through six and a significantly lower percentage in higher grades seven through twelve.
- While the average student has an 80% chance of entering the twelfth grade, the migrant student has an 11% chance of doing so. Most principals consider economic pressures to be the greatest cause of students dropping out.
- It takes about three years for the average migrant student in California and Texas to move about one grade level from the third to fourth grades, after which he or she never seems to catch up.
- The majority of students react positively toward school. Of those who want to drop out 53% said they wanted or needed to work.
- Parents are supportive of school and of their children's attendance.
- Eighty-three percent of the students reported attending no more than two schools during the year.[16]

What is most discouraging about such findings is that they corroborate the findings of earlier studies of migrant education dating back to 1954. These previous studies documented serious gaps in age/grade equivalencies, a high dropout rate and the same expressed support of parents and children for the schools.

In all of this there seems to be a significant relationship between the poor educational record of migrant children in general and the fact they engage in significant child labor.

The whole migrant life style is work oriented. The family moves for one purpose—to work. Family moves can rarely be scheduled around the school term, causing the child to interrupt his or her education. The migrant life style generally presumes that the whole family will work starting

Photo by Bill Cronin, courtesy of the New York State Migrant Center

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at an early age. Children grow up with a sense of obligation to contribute to the family income. As one nine year old expressed it, "I hate to pick beans, but I gotta earn my livin'".

A look at the economic reality of the migrant family income further explains the pressure to put the entire family to work whenever work is available. According to the U.S. Department of Agriculture, migrant farm workers in 1974 worked an average of 138 days at $16.50 per day for an average annual income of $2,276.00.[17] Under these circumstances even sincere feelings and convictions about the importance of education for their children are understandably set aside.

The USOE study also points out that the migrant child really begins to get into trouble educationally about the age of eight or nine, the period when children begin to work seriously in the fields. The fact that most children indicated enrollment in no more than two schools in the course of the year very likely indicates that the children simply do not enroll in school in each community in which they live during their seasonal migrations.

It seems quite obvious that the interrupted attendance, the changing of schools and the pressures to work in order to survive are taking their toll on migrant children's ability to obtain the benefits of education.

Child labor on the farms in this country is an emotional and deepseated issue deriving much of its support from adults who remember with nostalgic fervor the strawberries they picked or the cow they milked down on the family farm. Equally fervent support comes from those who are deeply rooted in the Protestant work ethic which holds that work is a virtue, building character and moral fiber, even in children. Still others support child labor by the poor as a means of training them to follow in their parents' footsteps, the only role they are believed capable of fulfilling.

On the other hand, opponents of child labor insist there is no economic justification for child labor in today's society. They insist that if the best interests of our society and of children are to be served, then all aspects of the agriculture industry must be prevented from using child labor. They believe that until such action is taken that some segments of the agriculture industry will not take the necessary steps to develop alternative sources of labor.

What is clear is that child labor in agriculture will remain an issue in the forseeable future, dramatically shaping the lives of the children of migrant farmworkers and other poor families. It yet remains to be seen whether the trend over the past forty-five years toward strengthening the law will continue and prevail. One thing, however, is certain: greater effort on the part of state and federal government is essential if present laws are to be enforced and children are to receive the protection which they deserve.

Footnotes

1. Fair Labor Standards Act, as amended, April 8, 974, 29 U.S.C. 213 (c) (1) (1976 Supplement).

2. C.A. No. 74—450, D. Ore., Preliminary Restraining Order, June 22, 1974; removed Sept. 13, 1974 (three judge court).

3. "Child Labor and the Nation, 1906," National Child Labor Committee Publications, 1907.

4. "Attitude of Society Toward the Child as an Index of Civilization," Speech, Felix Adler, Ph.D., December 1906, National Child Labor Committee Publications, 1907, p. 5.

5. "Child Labor in Agriculture," a report by the American Friends Service Committee, in cooperation with the National Committee on the Education of Migrant Children, Summer, 1970.

6. Fair Labor Standards Act, Amendments of 1949, 29 U.S.C. 213 (c).

7. Kloak, Dale B., "Laboring Youngsters," *New Generation*, Vol. 53, No. 3 (1972), pp. 7-10.

8. Cal. Stats. Ch. 144 §17 (June 28, 1975).

9. Taylor, Ronald, *Sweatshops in the Sun*, Beacon Press, 1973, p. 104.

10. *Ibid.*, pp. 118-120.

11. See accompanying article by Jose Cardenas in this issue for a discussion of the shortened school year programs.

12. Hearings of the Senate Subcommittee on Migratory Labor, July 20, 1970, Part 8-A, p. 5077.

13. Hearings of the Senate Subcommittee on Agricultural Labor, House of Representatives, April 18, 1975, pp. 57-66.

14. *Evaluation of the Impact of ESEA Title I Programs for Migrant Children of Migrant Agricultural Workers*, Vol. 1, Exotech Systems, under contract to the U.S. Office of Education, 1974, pp. 6-8. ("Exotech Evaluation")

15. See accompanying article by Mark Masurofsky for an analysis of the Title I-Migrant Program.

16. "Exotech Evaluation"

17. *Hired Farm Labor Force*, U.S. Department of Agriculture, p. 6.

Notes and Commentary

This section of Inequality in Education *features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section.*

CORPORAL PUNISHMENT

WIDESPREAD MISUNDERSTANDING OF SUPREME COURT RULING

Baker v. *Owen,* 395 F. Supp. 294 (M.D.N.C. 1975).

The meaning of the Supreme Court's recent action, summarily affirming a lower court corporal punishment decision, has been widely misinterpreted. The summary in *Education Daily* (October 21, 1975) is typical: "Now the law of the land, Judge J. Braxton Craven's April decision. . . ."

The opinion of the three-judge district court in *Baker* v. *Owen,* 395 F. Supp. 294 (M.D.N.C. 1975) contained three separate holdings. First, the court held that the statute permitting corporal punishment was not unconstitutional by reason of its failure to require parental consent before corporal punishment is used. Second, the court held that students must be afforded minimal due process protection when subjected to corporal punishment.[1] Third, it held that the force used in this particular instance of corporal punishment was not so excessive as to constitute cruel and unusual punishment. The plaintiffs did not argue that corporal punishment is unconstitutional in and of itself, so that issue was not decided upon by the lower court at all. (It is unlikely, however, that this particular court would have been sympathetic to such a claim. Plaintiffs have yet to win on this issue in any other court.)

The Supreme Court, in summarily affirming the district court's judgment, 96 S.Ct. 210 (1975), did not put its stamp of approval on each of these holdings.

First, only one issue was appealed by either of the parties—the parental consent issue.[2] This was the only issue before the Supreme Court. Thus, the Supreme Court has not in any way spoken on the other issues decided by the lower court—due process protections and whether the punishment was cruel and unusual as administered. The legality of corporal punishment *per se,* since not even an issue for the lower court, was of course not addressed by the Supreme Court. Lower courts thus remain free to consider these issues for themselves.

Second, even on the issue of parental consent, it is not clear that the Supreme Court has laid down the "law of the land." In looking at the weight it accords to its own summary affirmances for purposes of its own decisions, the Court has stated,

> . . . these three summary affirmances obviously are of precedential value. . . . Equally obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. (*Edelman* v. *Jordan,* 94 S.Ct. 1347, 1359 (1974))

The perils of reading too much into a summary affirmance were also pointed out by the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society* 95 S.Ct. 1612, 1628 fn. 46 (1975).

There are three major reasons for questioning the weight of a summary affirmance by the Supreme Court. First, as Chief Justice Burger has pointed out, "When we summarily affirm without opinion the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached." *Fusari* v. *Steinberg,* 95 S.Ct. 533, 541 (1975) (concurring opinion). Second, a summary affirmance does not

reflect the same consideration by the Court as a decision which has been preceded by oral argument by the parties and has been supported by the Court's carefully worded opinion. Third, it is important to recognize that the Court has an obligation to decide appeals from three-judge courts. It does not have the luxury of denying *certiorari* in these cases. Thus, a summary affirmance, without hearing argument or issuing an opinion, may often represent a case the Court would have preferred not to decide.

Some lower courts consider themselves bound by summary affirmances. *Jordan* v. *Weaver,* 472 F.2d 985, 989 (7th Cir. 1973); *Mercado* v. *Rockefeller,* 502 F.2d 666, 673 (2nd Cir. 1974). Others do not consider themselves bound, holding that summary affirmances have little precedential value. *Dillenburg* v. *Kramer,* 469 F.2d 1222, 1225 (9th Cir. 1972); *Jordan* v. *Gilligan,* 500 F.2d 701, 707-708 (6th Cir. 1974). Until the Supreme Court provides more guidance on how to interpret its decisions, the effect of its summary affirmance will depend in part upon which jurisdiction you are in. Again, however, even in those jurisdictions which consider summary affirmances binding, only the issue of parental rights has been decided by the Supreme Court.

Finally, a caution. The limited effect of the Supreme Court's action leaves it open for plaintiffs to continue to pursue various kinds of challenges to corporal punishment in the lower courts. Given the current disposition of the Supreme Court, it would probably be unwise to seek a Supreme Court definitive determination of these issues, which could easily foreclose lower courts from reaching more favorable results.

Paul Weckstein

Footnotes

[1] The lower court set out a rather diluted notion of the elements of that due process: (1) approval of the general use of corporal punishment in the school by the principal; (2) except where the misconduct is "so antisocial or disruptive as to shock the conscience", prior notice that specific misconduct could occasion the use of corporal punishment and insurance that it is not used as a first line of punishment; (3) punishment only in the presence of a second school official who is informed beforehand and in the student's presence of the reason for the punishment, thus allowing the student to protest spontaneously, rather than providing the student with explicit notice of a right to present his/her side; and (4) written explanation to the parent upon the parent's request.

[2] Verified by phone conversation with the attorney for the plaintiffs.

This opinion first appeared in *The Last Resort,* (Volume 4, Number 2. November/December, 1975), newsletter of the Committee to End Violence Against the Next Generation, Inc. (EVAN-G), Berkeley, California.

SEX DISCRIMINATION

JUDICIAL STANDARDS STILL UNCLEAR[1]

Finding that "there is sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex schools," the Third Circuit Court of Appeals recently reversed a decision of the Federal District Court of the Eastern District of Pennsylvania which had determined that the maintenance of a single-sex high school by a public school system is sexually discriminatory.[2] *Vorchheimer* v. *School District of Philadelphia,* ___F.2d ___.44LW 2474 (3d Circ., March 16, 1976), rev'g ___F. Supp. ___(E.D. Pa. 1975).

Susan Vorchheimer, an outstanding student, was denied entrance to the elite all-male academic high school maintained by the school district of Philadelphia. The district court found that even though the school system maintains an academically excellent all-female high school, its refusal to admit Vorchheimer to Central High, the male academic high school, denied her equal protection of the law. The district court further found that the district's policy of maintaining two sex-exclusive academic high schools had an adverse impact on female students who wished to attend a coeducational academic high school even though the exclusion of women from Central did not produce a feeling of inferiority and carried no stigma for those females attending Girls High. The district court refused to consider whether the existence of an equally good all-female academic

high school provides the class with a viable alternative which might substantially diminish the impact of gender based discrimination against females, or which might lead it into a discussion of reverse discrimination against males.

In reversing the district court's decision, the court of appeals finds that the Equal Educational Opportunities Act of 1974 does not require sexual integration of schools, although it does specifically prohibit segregation on the basis of race, color or national origin. (20 U.S.C. §1703(a)). The court then goes on to consider the constitutional issues involved. It rejects the appellant's argument that, as in the area of race, the doctrine of separate but equal should be declared unconstitutional in the area of sex. Relying on the Supreme Court's failure to declare sex a suspect classification, the court of appeals stated that "there are differences between the sexes that may, in limited circumstances, justify the disparity in law."

No Clear Standard

The Supreme Court has done little in the past year to clear up the uncertainty resulting from its inharmonious decisions in *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971) and *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973)[3]. The six cases decided to date since *Frontiero* have failed to resolve the conflict between the "strict rationality" standard of *Reed* and the compelling state interest standard of *Frontiero*, and have done little more than exemplify the continuing disagreement among the justices. *Stanton* v. *Stanton*, ___ US ___, 95 S.Ct. 1373 (1975); *Weinberger* v. *Wiesenfeld*, ___ US ___, 95 S.Ct. 1225 (1975); *Taylor* v. *Louisiana*, ___ US ___, 95 S.Ct. 692 (1975)[4]; *Schlesinger* v. *Ballard*, ___ US ___, 95 S.Ct. 572 (1975); *Geduldig* v. *Aiello*, 417 US 484, 94 S.Ct. 2485 (1974); *Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974). The general tenor of the Court is toward an acceptance of the *Reed* standard, although a vocal minority led by Justice Brennan continues to insist that sex discrimination is invidious and should be viewed with strict scrutiny.

The *Reed* standard was explicitly adopted in the *Kahn* and *Stanton* opinions. *Kahn* involved a widower's challenge to a Florida statute which granted widows, but not widowers, a $500 property tax exemption. In a decision written by Justice Douglas, the Court found the state "law reasonably designed to further a [legitimate] state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." 94 S.Ct. at 1737. The Court relied on data showing the disparity of earnings between men and women and concluded the situation was therefore distinguishable from that in *Frontiero*, where the state's policy was based solely on administrative convenience. The Court chose not to adopt the dissent's view that the legislation was overinclusive, benefitting independently wealthy widows while failing to provide similar relief for widowers dependent on their wives' earnings. The *Stanton* situation was more analogous to that in *Reed*. It concerned a Utah statute which mandated different ages of majority for male and female children receiving child support. The court rejected "old notions" that "a female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl." 95 S.Ct. at 1378.

In *Weinberger* v. *Wiesenfeld* the court found that a gender-based distinction in the Social Security Act violated fifth amendment guarantees in granting survivor's benefits based on a father's earnings to his minor child and his widow, but granting a mother's benefits only to the child. Justice Brennan in writing the decision for the majority found the government's rationalization for this scheme to be based on an archaic and overbroad generalization indistinguishable from that in *Frontiero*, i.e. that a female's earnings do not contribute significantly to the family's support. Brennan's reliance solely on *Frontiero* and his failure specifically to apply *Reed* indicates the Court's unwillingness to forego a strict scrutiny test despite its other decisions adopting the *Reed* standard.[5]

Significantly, the Court in *Wiesenfeld* refused to justify the statute as compensation for past and present discrimination against women which would distinguish the adverse impact on males. In this respect, the *Wiesenfeld* decision is

distinguishable from those in *Kahn* and *Schlesinger* v. *Ballard*, in which the Court justified the advantages accruing to women, and the resultant adverse impact on men, as compensatory. In fact, the Court recognized the adverse impact of the challenged statute on the male plaintiff in *Wiesenfeld* even though its language is couched in terms of the protection afforded women workers. The decision clearly states that a widowed father who chooses to care for his child rather than work should have the same benefits as his wife would have. 95 S.Ct. at 1235-6.

It is significant also that no analogy was made to the classification discussed in *Geduldig* v. *Aiello*. In *Geduldig*, the Court found that a classification excluding normal pregnancy from state disability insurance benefits was not gender-based, but rather was a rational actuarial and fiscal policy which distinguished this temporary disability from others suffered by both sexes. Likewise, in *Wiesenfeld*, the Court could have interpreted the statutory distinction as one involving the rights of minor children and not those of the widowed father.

Schlesinger v. *Ballard* is significant in that it reversed a lower three-judge court which based its decision on the strict scrutiny standard of *Frontiero*. In a challenge by a male naval officer,

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the Court held that a federal statute which granted female naval officers a longer time than male naval officers to gain promotion before being mandatorally discharged was constitutional. The court distinguished the statute from those in *Frontiero* and in *Reed* and therefore chose not to apply the *Frontiero* standard. Finding that men and women in the Navy are not similarly situated (as they were in *Reed* and *Frontiero)*, the Court inferred a legislative intent to compensate women for the unequal opportunities for promotion they may have in the Navy. It found the discrepancies in the legislation rational based on this presumed intent. While distinguishing the classification here from that in *Reed*, the court implicitly applied the rational relationship standard to the situation presented.

Interpretations by Lower Courts

Attempts by lower courts to fashion a rule based on these divergent views are inconclusive and unpersuasive. For example, Judge Newcomer in *Vorchheimer* attempts to distinguish the Court's application of the standards in cases in which the sex-based classification is justified by administrative convenience or by more substantive state interests (like that in *Ballard*), cases in which the classification furthers a legitimate state interest, and cases in which the classification is viewed as either beneficial or adverse to women. The judge chose to examine the evidence presented rather than attempt to divine the intent of the Supreme Court. He applies the "fair and substantial relationship" test in finding the school board's policy unconstitutional.

Most courts have not taken the arduous approach of Judge Newcomer in attempting to fashion a construct which will determine which standard to use. The court in *Gilpin* v. *Kansas State High School Activities Ass'n, Inc.* 377 F.Supp. 1233 at 1239 (D.Kan. 1974) attempts to guard against "judicial hypothesizing" by adopting the *Frontiero* view that sex is a suspect classification. In holding that female athletes could not be denied the opportunity to try out for a boy's cross-country team the Court simply states that it is "persuaded by the reasoning of the [plurality] opinion" in *Frontiero*. Three other courts have opted, however, for the *Reed* standard based on their analysis of current case law. In *Edwards* v. *Schlesinger*, (a challenge to the single-sex status of the Air and Naval Academies, which was reversed on procedural grounds) the court relied on the fact that *Frontiero* was a plurality decision and therefore "sex was not clearly made a suspect classification." The court also relied on the *Kahn* decision. In *Kohr* v. *Weinberger*, the Court's quandry was resolved by its reading of *Kahn* and *Geduldig* in adjudicating a challenge to the Social Security statute requiring three fewer years to compute a woman's benefit computation years than a man's. The *Kohr* and *Edwards* decisions, however, were rendered before *Wiesenfeld*. See also, *Women's Liberation of Rhode Island* v. *Israel, supra*. 512 F2d. 106 (C.A. 1, 1975)

Conclusions

One of the more troubling aspects of the court's current stance is its refusal to deal with the issues raised by *Kahn, Ballard*, and *Kohr*. While the spectre of reverse discrimination claims opens a pandora's box of problems, the court has failed to consider the issue in depth. The decisions in *Kahn* and *Ballard* are based on overbroad generalizations about the relative economic status and employment opportunities of men and women, similar to those which the court found faulty in *Wiesenfeld* and *Stanton*. By basing its decisions in these cases on general evidentiary and legislative presumptions, the Court may well be perpetrating gender-based distinctions under a subtle guise of benign paternalism.

Thus the dilemma remains. A majority of the court is reluctant to label sex a suspect classification. It is possible, as the lower court in *Wiesenfeld* v. *Secretary of the H.E.W.*[6] suggested, that the Court will not enunciate a clear standard until faced with a classification which could be sustained under the rational relationship test but not under the strict scrutiny test. Or perhaps, as Justice Powell suggests in his concurrance in *Frontiero*[7], until the Equal Rights Amendment is ratified.

Linda Scholle

FOOTNOTES

1. This note is intended as a supplement to "Judicial Standards for Determining Sex Discrimination" by Paul Weckstein which appeared in 18 *Inequality in*

Education 58 (Oct. 1974) and which provides a more comprehensive view of standards applied in sex discrimination cases.

2. The situation in *Vorchheimer* is therefore distinguishable from two other cases challenging sexually discriminatory policies in the administration of public academic high schools. Both *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264 (9th Cir., 1974) and *Bray* v. *Lee*, 337 F.Supp. 934 (D.Mass. 1972) challenged admission policies at academic high schools which required females to have higher test scores than males and which, therefore, resulted in a denial of opportunities for some academically superior females.

3. The standard enunciated in *Reed* is:

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)

404 U.S. at 76, 92 S.Ct. at 254. That in *Frontiero* is:

> . . . classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.

411 U.S. at 688, 93 S.Ct. at 1771. This standard is enunciated in the plurality opinion of Justices Brennan, Douglas, White and Marshall. Separate concurrances were filed by Justice Stewart and Justice Powell (joined by Chief Justice Burger and Justice Blackmun). Justice Rhenquist dissented.

4. *Taylor* involved a criminal defendant's challenge to the Louisiana jury selection rule which excluded women from jury venires unless they filed written declarations of desire to be subject to jury service. The Court found the constitutional and statutory exclusions invalid on sixth amendment grounds and did not deal with the issue of a potential female juror's fourteenth amendment right to be included on jury venires. However, in *dicta*, the Court did imply that its earlier opinion in *Hoyt* v. *Florida*, 368 U.S. 57, 82 S.Ct. 159 (1961) was no longer tenable considering the evolving status of women in contemporary society. *Taylor* is relevant to a discussion of fourteenth amendment standards because of this discussion and because the Court vacated and remanded a companion case, *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D.Ca. 1973), prob. juris. noted 94 S.Ct. 1405 (1974), vac. 95 S.Ct. 2410 (1975), with instructions to consider whether a potential female juror's challenge to the Louisiana rule was moot in light of its ruling in *Taylor*.

5. Justice Powell, with Chief Justice Burger joining, concurred with the majority's decision, but stated that no legitimate governmental interest supported the distinction made on the basis of sex (the *Reed* standard). Justice Rhenquist concurred, stressing that the purpose of the statute was to benefit the minor child and that any distinction between parents was irrational for this reason.

6. 367 F.Supp. 981, 990 (D.N.J. 1973)

7. 93 S.Ct. at 1773. Justice Powell states: "There is another and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, *which is adopted will resolve the substance of this precise question*, has been approved by the Congress and submitted for ratification by the States." (emphasis added). In the plurality opinion, Justice Brennan notes Congress' passage of the ERA as an indication that it considers classifications based on sex inherently suspect. (93 S.Ct. at 1771).

HEW WITHDRAWS CONTROVERSIAL RULES, PLEDGES TO INVESTIGATE COMPLAINTS

Bowing to intense pressure from women's and civil rights organizations, HEW Secretary F. David Mathews formally announced the withdrawal of a "proposed consolidated procedural regulation for civil rights enforcement." This draft regulation had been the target of sharp criticism by groups concerned with the rights of women, minority group members and the handicapped since its release in June of 1975.

The proposed regulation would have substantially changed the focus of HEW enforcement of various laws prohibiting discrimination by releasing HEW from its obligation to investigate all complaints of discrimination. In his March 16, 1976 press conference announcing the withdrawal of the regulation, Mathews said that HEW's "policy will be to seek a timely resolution of every complaint it receives. . . . The purpose of withdrawing this regulation is to reaffirm [HEW's] commitment to that principle."

The proposed procedural regulation would have applied to Title IX, Title VI of the 1964 Civil Rights Act, sections 799A and 845 of the Public Health Service Act, section 504 of the Rehabilitation Act, section 406 of the Alcohol and Drug Abuse and Treatment Act, and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act.

HEW will continue to explore ways of consolidating enforcement of the various civil rights laws it enforces and plans to publish "a series of interrogatories" in the *Federal Register* towards this end. In the meantime, the procedures for Title VI of the 1964 Civil Rights Act will be used for resolving Title IX complaints.

SUMMARY OF THE REGULATION* FOR TITLE IX EDUCATION AMENDMENTS OF 1972

Title IX of the Education Amendments of 1972 says:

"No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . ."

With certain exceptions, the law bars sex discrimination in any academic, extracurricular, research, occupational training or other educational program (preschool to postgraduate) operated by an organization or agency which receives or benefits from federal aid. Exempted from the provisions of Title IX are schools whose primary purpose is training for the U.S. military services or the merchant marine and educational institutions controlled by religious organizations whenever compliance with Title IX would be contrary to their religious beliefs. In addition, the "Bayh Amendment" to Title IX exempts the membership policies of the Girl and Boy Scouts, the YMCA and YWCA, Campfire Girls and other single-sex "youth service organizations" whose members are chiefly under age 19. This special exemption does not apply to recreational youth groups such as Little League. Also exempted by the amendments are university-based social fraternities and sororities.

Basically, the regulation for Title IX falls into five categories: general matters related to discrimination on the basis of sex, admissions, treatment of students once they are admitted, employment and procedures.

The following summary was adapted by PEER from a summary prepared by the Resource Center on Sex Roles in Education of the National Foundation for Improvement of Education.

GENERAL PROVISIONS § 86.3 - 86.9

Each recipient of federal education aid must evaluate its current policies and practices to determine whether they comply with Title IX. Each recipient must then take whatever steps are necessary to end discrimination. Institutions must keep a description of these steps on file for three years, and they must complete the evaluation and steps to overcome the effects of bias within one year of the date the regulation takes effect.

The regulation also requires that recipients adopt and publish grievance procedures to resolve student and employee complaints alleging discrimination prohibited by Title IX.

ADMISSIONS § 86.21-86.23

The regulation bars sex discrimination in admissions to certain kinds of institutions: those of vocational, professional, graduate, and public coeducational undergraduate institutions. Admissions to private undergraduate institutions are exempt, including admissions to private, undergraduate professional and vocational schools. HEW will look at the admissions practices of each "administratively separate unit" separately.

Specifically, the regulation bars limitations (i.e., quotas) on the number or proportion of persons of either sex who may be admitted, preference for one sex, ranking applicants separately by sex, and any other form of differential treatment by sex.

The recipient may not use a test or other criterion for admission which adversely affects any person on the basis of sex unless the test or criterion is shown to predict validly successful completion of the educational program, and unbiased alternatives are not available. Also prohibited are rules concerning parental, family, or marital status of students which make distinctions based on sex; discrimination because of pregnancy or related conditions; and asking an applicant's marital status. Recipients can ask an applicant's sex if the information is not used to discriminate.

The recipient must make comparable efforts to recruit members of each sex, except when special efforts to recruit members of one sex are needed to remedy the effects of past discrimination.

TREATMENT OF STUDENTS § 86.31 - 86.42

General coverage § 86.31

Although some schools are exempt from coverage with regard to admissions, all schools must treat their admitted students without discrimination on the basis of sex. Briefly, the treatment of students section covers courses and extracurricular activities (including student organizations and competitive athletics), benefits, financial aid, facilities, housing, rules and regulations (including rules of appearance), and research. A student may not be limited in the enjoyment of any right, privilege, advantage or opportunity based on sex.

The regulation forbids a recipient to aid or perpetuate sex discriminiation by providing "significant assistance" to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees (with some exceptions, including the membership policies of social fraternities and sororities, Boy and Girl Scouts, YMCA and YWCA). Significant assistance includes the provision of a facility or faculty sponsor.

* 45 CFR Part 86. The text appears in the *Federal Register*, June 4, 1975, page 24128.

Housing and Facilities § 86.32 and 86.33

Institutions may provide housing separately for men and women. However, housing for students of both sexes must be as a whole:

- proportionate in quantity to the number of students of that sex that apply for housing, and
- comparable in quality and cost to the student.

Institutions may not have different housing policies for students of each sex (for example, if a college allows men to live off campus, it must allow women too).

Toilets, locker rooms and shower facilities may be separated on the basis of sex, but these facilities must be comparable for students of both sexes.

Courses and other Educational Activities § 86.34 and 86.35

Courses or other educational activities may not be provided separately on the basis of sex. An institution may not require or refuse participation in any course by any of its students on that basis. This includes physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

However, sex education is an exception: portions of elementary and secondary school classes dealing with human sexuality may be separated by sex.

In physical education classes, students may be separated by sex *within* coeducational classes when playing contact sports. Contact sports include wrestling, rugby, ice hockey, football, basketball, and any other sport "the purpose of major activity of which involves bodily contact".

Choruses may be based on vocal range or quality and may result in single-sex or predominantly single-sex choruses.

Local school districts may not, on the basis of sex, exclude any person from:

- any institution of vocational education;
- any other school or educational unit, unless the school district offers the other sex courses, services and facilities which are comparable to those offered in such schools, following the same policies and admission criteria.

Counseling § 86.36

A recipeint may not discriminate on the basis of sex in counseling or guiding students.

Whenever a school finds that a class has a disproportionate number of students with one sex, it must take whatever action is necessary to assure itself that sex bias in counseling or testing is not responsible.

A recipient may not use tests or other appraisal and counseling materials which use different materials for each sex or which permit or require different treatment for students of each sex. Exceptions can be made if different materials used for each sex cover the same occupations and they are essential to eliminate sex bias.

Schools must set up their own procedures to make certain that counseling and appraisal materials are not sex-biased. If a test does result in a substantially disproportionate number of students of one sex in a course of study or classification, the school must take action to ensure that bias in the test or its application is not causing the disproportion.

Student Financial Aid § 86.37

The regulation covers all forms of financial aid to students. Generally, a recipient may not, on the basis of sex:

- provide different amounts or types of assistance, limit eligibility, apply different criteria, or otherwise discriminate;
- assist through solicitation, listing, approval, provision of facilities, or other services any agency, organization or person which offers sex-biased student aid;
- employ students in a way that discriminates against one sex, or provide services to any other organization which does so.

There are exceptions for athletic scholarships and single-sex scholarships established by will or trust.

Athletic scholarships. An institution which awards athletic scholarships must provide "reasonable opportunities" for both sexes, in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. Separate athletic scholarships for each sex may be offered in connection with separate male/female teams to the extent consistent with both the section on scholarships and the section on athletics (86.41).

Scholarships for study abroad. The regulation exempts discriminatory student assistance for study abroad (such as Rhodes Scholarships), provided that a recipient which administers or helps to administer the scholarship awards makes available reasonable opportunities for similar studies for the other sex.

Single sex scholarships. An institution may administer or assist in the administration of scholarships and other forms of student financial aid whenever a will, trust, or bequest specifies that the aid can only go to one sex, as long as the overall effect of making sex-restricted awards is not discriminatory.

To ensure this, institutions must:

- select financial aid recipients on the basis of

nondiscriminatory criteria, not the availability of sex-restricted scholarships.

- allocate sex-restricted awards to students already selected in such a fashion; and
- ensure that no student is denied an award because of the lack of a sex-restricted scholarship.

Student Health and Insurance Benefits § 86.39

Student medical, hospital, accident or life insurance benefits, services, or plans may not discriminate on the basis of sex. This would not bar benefits or services which may be used by a different proportion of students of one sex than of the other, including family planning services.

Any school which provides full coverage health services must provide gynecological care.

Marital or Parental Status § 86.40

The regulation bars any rule concerning a student's actual or potential parental, family, or marital status which makes distinctions based on sex.

A school may not discriminate against any student in its educational program, including any class or extracurricular activity, because of the student's pregnancy, childbirth, false pregnancy, miscarriage, or termination of pregnancy, unless the student requests voluntarily to participate in a different program or activity.

If a school does offer a voluntary, separate education program for pregnant students, the instructional program must be comparable to the regular instructional program.

A school may ask a pregnant student to have her physician certify her ability to stay in the regular education program only if it requires physician's certification for students with other physical or emotional conditions.

Recipients must treat disabilities related to pregnancy the same way as any other temporary disability in any medical or hospital benefit, service, plan or policy which they offer to students. Pregnancy must be treated as justification for a leave of absence for as long as the student's physician considers medically necessary. Following this leave, the student must be reinstated to her original status.

Athletics § 86.41

General coverage. The regulation says that no person may be subjected to discrimination based on sex in any scholastic, intercollegiate, club or intramural athletics offered by a recipient of federal education aid.

Separate teams and contact sports. Separate teams for each sex are permissible in contact sports or where selection for teams is based on competitive skill. Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and any other sport "the purpose or major activity of which involves bodily contact."

In *noncontact* sports, whenever a school has a team in a given sport for one sex only, and athletic opportunities for the other sex have been limited, members of the other sex must be allowed to try out for the team.

Equal opportunity. A school must provide equal athletic opportunity for both sexes. In determining whether athletic opportunities are equal, HEW will consider whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes. The Department will also consider (among other factors): facilities, equipment, supplies, game and practice schedules, travel and per diem allowances, coaching (including assignment and compensation of coaches), academic tutoring, housing, dining facilities, and publicity.

Equal expenditures are not required, but HEW "may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

Adjustment period. Elementary schools must comply fully with the section covering athletics "as expeditiously as possible" but no more than one year from the effective date of the regulation. Secondary and post-secondary institutions have three years from the regulation's effective date to comply fully.

Textbooks § 86.42

The regulation does not require or abridge the use of particular textbooks or curriculum materials.

EMPLOYMENT § 86.51 - 86.61

General Provisions § 86.51 - 86.55

All employees in all institutions are covered, both full-time and part-time, except those in military schools, and those in religious schools to the extent compliance would be inconsistent with the controlling religious tenets.

In general, the regulation prohibits: discrimination based on sex in employment, recruitment, and hiring, whether full-time or part-time, under any education program or activity which receives or benefits from federal financial aid. It also bars an institution from entering into union, employment agency, or fringe benefit agreements which subject individuals to discrimination.

An institution may not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employees' em-

ployment opportunities or status because of sex.

The regulation prohibits sex discrimination in all aspects of employment, including employment criteria, advertising and recruitment, hiring and firing, promotion, tenure, pay, job assignments, training, leave, and fringe benefits.

Fringe benefits § 86.56

Fringe benefit plans must provide *either* for equal periodic benefits for male employees *or* equal contributions for both sexes. Retirement plans may not establish different retirement ages for employees of each sex.

Marital status and pregnancy § 86.57

An institution may not apply any employment policy concerning the potential marital, parental or family status of an employee or employment applicant which makes distinctions based on sex.

An institution may not discriminate in employment on the basis of pregnancy or related conditions. A temporary disability resulting from these conditions must be treated as any other temporary disability for all job-related purposes, including leave, seniority, reinstatement and fringe benefits. If the employer has no temporary disability policy, pregnancy and related conditions must be considered a justification for leave without pay and the employee reinstated to her original or comparable status when she returns from leave.

Effect of state and local laws § 86.58

The obligation to comply with this regulation is not precluded by any state or local laws.

ENFORCEMENT PROCEDURES §86.71*

Pending HEW's final issuance of a consolidated procedural regulation dealing with Title IX and other civil rights laws, the Department will follow the procedures of Title VI of the Civil Rights Act of 1964 to implement the Title IX regulation. Under these procedures HEW conducts compliance reviews — broad-based investigations of school districts or universities initiated by HEW. HEW will also investigate complaints submitted by individuals or groups.

The Title IX procedures require educational institutions to keep records demonstrating whether they are complying with the law's requirements. Records must be available to HEW upon request.

Discrimination complaints must be filed with HEW within 180 days of the date of discrimination. Aside from this requirement, no specific time limits are set on any other proceedings. If after investigation, HEW finds that discrimination exists, it can try to achieve voluntary compliance by the institution. Failing this, HEW may then begin administrative hearings which could lead to termination of federal financial assistance.

HEW can also refer the matter to the Department of Justice for possible federal prosecution or to state or local authorities for action under state or local laws. Under the provisions for administrative hearings, recipient institutions (but not the complainant) are granted the right to counsel and the right to appeal.

*The full text of these procedures appears at 45 CFR §§ 80.6 - 80.11 and 45 CFR Part 81.

The above summary was prepared by PEER, The Project on Equal Educational Rights, a project of the NOW Legal Defense and Education Fund. Additional reprints of this summary are available from: PEER, 1029 Vermont Avenue, N. W., Suite 800, Washington, D.C. 20005.

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Bilingual/Bicultural Education

HEW SPECIFIES BILINGUAL EDUCATION REQUIREMENTS

The Department of Health, Education and Welfare (HEW) has recently taken steps to delineate the kinds of language programs required of local school districts under the *Lau* standard.

As previously noted in *Inequality in Education* #16 (March 1974, p. 58), #17 (June 1974, p. 64), and #19 (February 1975, p. 51), the Supreme Court left open in *Lau* the question of what programs are adequate to provide access to equal educational opportunity for non-English speaking children. In an August, 1975 memorandum to Chief State School Officers from the U. S. Commissioner of Education and the Director of HEW's Office for Civil Rights, the Department has taken a giant step forward in attempting to specify program detail, choice and method.

The memorandum consists of a two-page cover letter and several attachments, the most critical of which is entitled "Task Force Findings Specifying Remedies Available For Eliminating Past Educational Practices Ruled Unlawful Under *Lau* v. *Nichols.*" These "findings" are an outline of required procedures to be followed by school districts with twenty or more non-English speaking children.

Language Assessment Required

The first section of the outline concerns identification of the student's primary or home language. This assessment must be made by persons who can speak and understand the languages involved, and must include analysis of (a) the child's first acquired language, (b) the language most often spoken by the child, and (c) the language most often spoken in the child's home. If, in any one of the foregoing situations, a language other than English is used, then the child is to be counted as having a non-English primary language. Students who are found to have non-English primary languages are then classified according to the "degree of linguistic function or ability". Students may be classified as (a) monolingual speakers of languages other than English, (b) predominant speakers of languages other than English, (c) bilingual, that is, speaking both languages with equal ease, (d) predominantly English, or (e) monolingual English speakers.

These classifications, along with the student's age, determine which programs must be selected to overcome linguistic exclusion. For instance, in the case of a monolingual speaker of a language other than English who is at the elementary or intermediate grade level, acceptable programs include transitional bilingual education, bilingual-bicultural education or multilingual-multicultural education. The finding makes clear that an English-as-a-Second-Language (ESL) approach is inadequate for students at this grade level who are either monolingual or predominant speakers of a language other than English. This is the most important programmatic position yet taken by HEW on the subject and is supported in the findings by this rationale: "Because an ESL program does not consider the affective or cognitive development of students in this category and time and maturation variables are different here than for students at the secondary level, an ESL program *is not* appropriate." (emphasis in original).

The findings spell out the types of programs appropriate at each school level for each of the classifications of language ability. School districts are generally allowed more flexibility with secondary students than with elementary or intermediate students, and with those students who possess a greater command of English. However, it is made clear that no matter which type of program is utilized, its objective must be "to bring the linguistically/culturally different student(s) to the educational performance level that is expected by the Local Education Agency (LEA) and State of nonminority students."

The findings also address the areas of required and elective courses, instructional personnel requirements, racial/ethnic isolation, notification to parents and evaluation. Required courses such as American History must not be designed to exclude pertinent minority developments which have contributed to or influenced such subjects. Elective courses and co-curricular activities may

not be racially/ethnically identifiable. Such identifiability is considered to raise a *prima facie* case of discrimination. Title VI compliance questions are also raised by any analysis of counseling practices which indicates that minorities are being advised in a manner which results in their being disproportionately channeled into certain subject areas or courses.

Instructional personnel, under the new findings, must be linguistically/culturally familiar with the background of the students in the program. Where there is inadequate staffing available to implement the required programs, inservice training may be emphasized as well as the use of paraprofessionals. The use of such paraprofessionals must not be restricted to areas unrelated to the teaching process. In addition, the districts must include plans for securing the number of qualified teachers necessary to fully implement the required instructional programs.

Progress Reports Required

Evaluation requirements include the submission of target dates for completion of steps, a statement of expected results, and periodic evaluation throughout the implementation of the program. For the first three years a compliance plan is in effect the district must submit a progress report to HEW sixty days after the school year begins; a second progress report is to be submitted thirty days after the last day of school. It is not clear whether such reports are public information, although there is a general requirement that the districts must inform all parents of every aspect of the programs designed for students of limited English-speaking ability.

The cover memorandum to the findings warns that "school districts submitting voluntary compliance plans. . . which are not consistent with the outlined approaches or with other required plan elements must demonstrate affirmatively. . . that such plans, at a minimum, will be equally effective in ensuring equal educational opportunity." No indication is given as to what showing a district would have to make to meet the standard of "equally effective" and it is to be hoped that HEW will spell this out lest an unintended loophole develop. Of greater concern, however, is the question of the ability of HEW to enforce these new requirements. The HEW compliance process is a painfully slow mechanism; it can be safely predicted that the promise held out by the promulgation of these requirements will mean little unless advocates for quality bilingual-bicultural education programs take an active role in securing their enforcement.

Roger Rice

MONOGRAPH AVAILABLE ON BILINGUAL-BICULTURAL LEGISLATION

The Model Legislation Project of the Lawyers' Committee for Civil Rights Under Law, under contract with the Center for Applied Linguistics, has published a new monograph titled *The Current Status of U.S. Bilingual Education Legislation.*

This report collects federal, state and other "American-flag" legislation in effect as of April 15, 1975. In addition there is a brief discussion of major federal judicial decisions affecting bilingual education.

For further information on developing bilingual-bicultural legislation and regulations contact the Model Legislation Project, Lawyers' Committee for Civil Rights Under Law, 733 15th St. N.W., Washington, D.C. 20005.

Copies of the monograph *The Current Status of U.S. Bilingual Education Legislation* can be acquired for $3.50 prepaid by writing Ms. Marcy Taylor, Center for Applied Linguistics, 1611 North Kent St., Arlington, Virginia, 22209.

EXCLUSION

School Suspensions—Are They Helping Children? Children's Defense Fund, Cambridge, Massachusetts, 1975. $4.00, 255 pp.

One need not be an educator or a lawyer to know that the exclusion of students from the public schools for disciplinary reasons is a problem in our society. In addition to recent widespread media coverage, over one million students and

their parents yearly gain firsthand knowledge of what it means to be suspended from school. Suspensions have previously been characterized by courts and commentators as discriminatory, employed excessively, and devoid of procedural protections.* In a follow-up report to its broad-based study of school exclusion, *Children Out of School in America* (Cambridge, Mass., 1974), the Children's Defense Fund has attacked this problem head-on by demonstrating the shortcomings of suspensions as a means of furthering legitimate educational goals and advocating an end to disciplinary suspensions.

School Suspensions—Are They Helping Children? documents the widespread use of suspension as a disciplinary tool and its enormous potential for harm, and presents a number of alternatives currently being employed in schools. It is these alternatives that are the most persuasive aspect of the report. They convey a sense that education, especially in the big cities, is not a lost cause, that educators can be both humane and effective, and that most of the students described as disciplinary problems by their teachers can participate beneficially in the educational process.

The widespread publicity that accompanied the release of the CDF report centered around the statistics it presents, which vividly portray the extent of the suspension problem. Drawing on data from the Office of Civil Rights for school year 1972-73, and from the results of their own survey, CDF makes the following points:

- Over one million students, 4.2% of the twenty-four million included in the OCR survey, were suspended from school during the survey period. Among secondary students, 8% were suspended at least once.
- Over four million school days were lost as a result of suspensions.
- There were great variations in suspension rates among essentially similar school districts. For instance, Jacksonville, Florida suspended 11.1% of its students during the survey year while Miami, Florida suspended 2.8%
- In elementary schools blacks were suspended three times as often as whites, while in secondary schools blacks were almost twice as likely to be suspended as whites. Moreover, blacks were suspended for longer periods of time than whites.
- Most students were suspended for non-dangerous offenses. Truancy was the most common reason for suspension, and smoking also accounted for a significant number of suspensions.

The data clearly indicates that a large number of students are being suspended from school, often for trivial reasons, and, in addition, that blacks are being suspended in disproportionate numbers in school systems in every region of the country. One of the appendices charts the number and racial composition of suspensions by state and school district. Another appendix presents a number of analytical tools that are useful in analyzing the data to determine whether suspensions in a particular district are discriminatory.

Cumulative Effects

As disturbing as the statistics may be, the implications of suspensions for the students involved describe the problem in more poignant terms. The report indicates that suspensions may cause marginal students to drop out permanently, make repeated behavior problems more likely by labeling children as troublemakers, deny children needed educational services, and contribute to the delinquency problem by putting the children who are most in need of assistance out on the streets. Even short-term suspensions that appear to be harmless may have cumulative effects which will stigmatize a student with peers and teachers, put him/her far behind in schoolwork, and hurt his/her chances for future employment.

But suspensions are not inevitable. For example, Kenneth W. Haskins described to CDF his experience as principal of Morgan Community School in Washington D.C., in which major changes in the administration of the school were accompanied by a policy abolishing suspensions. Haskins served his entire term without suspending a student. Luther Seabrook, principal of an intermediate school on the West Side of Manhattan, appointed a popular teacher as "student ombuds-

*See *Inequality in Education* #20, July 1975, for a discussion of those issues in our pages.

man", and rather than suspending students who presented disciplinary problems, provided them with the services and support they needed to stay in school. Joseph W. Lee, superintendent of District 19 in Chicago which encompasses twenty-five schools and 23,000 students, has prohibited the use of disciplinary suspensions in his district for some time now, with promising results.

Two common themes run through the interviews with these educators. First, substantive changes must be made in the rules that govern students. Prohibitions against standing in class, running in the halls, and gum chewing, for example, make it more difficult to develop respect for more serious rules that the entire school community agrees are important. Second, there are many alternatives to suspension open to school officials for dealing with disciplinary problems. Peer group and professional counseling, alternate curricula, work-study programs, and drop-in centers are just a few of the examples presented in the CDF report. However, the key element in making these alternatives work seems to be the attitude taken by school administrators themselves. If they accept conflict and uncertainty as an inevitable consequence of the educational process rather than something that can be avoided by creating large numbers of trivial rules, and see themselves as mediators and resource people rather than disciplinarians, then alternatives can be found and suspensions effectively eliminated.

The CDF report is a challenge to educators and policy makers to take up where the law has left off. *Goss* v. *Lopez* established that at least minimal procedural safeguards must accompany even one-day school suspensions. At the same time, the use of suspensions was explicitly sanctioned as a legitimate means of school discipline. That there is a substantive justification for school suspensions is the assumption that must now be carefully examined.

The educational innovations detailed by CDF certainly point in that direction. Clearly, many more such experiments are needed for a majority of educators and politicans to be convinced. CDF offers a number of practical suggestions for citizen action that may speed up that process. Moreover, parents are encouraged to report all cases of discriminatory school discipline to the Office of Civil Rights, and to send a copy of their complaint to CDF so that enforcement efforts can be effectively monitored. But these practical suggestions should not overshadow the true import of the report. CDF has begun to make a rational, educationally justifiable case for the total elimination of disciplinary suspensions and, in doing so, provide a foundation for fundamental improvements in public education.

Burton B. Goldstein, Jr.

Disciplinary Exclusion: The New Connecticut Law

On July 8, 1975, the Governor of Connecticut signed into law Public Act No. 75–609, titled "An Act Concerning Exclusion from School for Disciplinary Purposes." The new law provides procedural safeguards prior to suspension, expulsion, and disciplinary transfer from school. Probably more significant are the substantive provisions which guarantee (1) an opportunity to complete any classwork and examinations the student missed during a suspension period, and (2) an alternative educational opportunity for an expelled student during an expulsion period, with no expulsion period to extend beyond the end of the school year.

The new Connecticut law replaces an old statute authorizing expulsion for "conduct inimical to the best interests of the school." As discussed below, the Connecticut Supreme Court subsequently held this old law, similar to many existing state exclusion statutes, too vague to constitute a valid delegation of power by the legislature. This note will summarize the major provisions of the new Connecticut exclusion law, and comment briefly on this law and exclusion

legislation in general.

Major Provisions

Removal from class, suspension, and expulsion are each treated differently by the new Connecticut law. The due process required prior to expulsion is extended to students who have been recommended for disciplinary transfers to another school. Under Section 2 of the new law, the board of education may authorize teachers to *remove* a student from class for a period of up to ninety minutes and send him/her to a designated area when he/she "deliberately causes a serious disruption of the educational process within the classroom, provided no pupil shall be removed from class more than six times in any year nor more than twice in one week" unless given the kind of informal hearing described for suspension below.

Under Sections 3 and 4 of P.A. No. 75–609, the board of education may also authorize school officials to *suspend* or *expel* "any pupil whose conduct endangers persons or property or is seriously disruptive of the educational process, or which conduct is violative of a publicized policy of such board." Each board of education is required by Section 5 of the new law to assure that all pupils within its jurisdiction are informed, at least annually, of the board policies governing student conduct. And each board of education is further required by Section 5 to provide an effective means of notifying, within twenty-four hours, the parents or guardian of any minor pupil who has been removed from class, suspended from school, or who is being recommended for expulsion or disciplinary transfer. Other provisions of the new law dealing with suspension and expulsion are described below.

Suspension

Section 1(c) of P. A. No. 75–609 defines suspension as "an exclusion from school privileges for no more than ten consecutive school days, provided such exclusion shall not extend beyond the end of the school year in which such suspension was imposed." Section 3 also states that "Unless an emergency exists, no pupil shall be suspended without an informal hearing before the building principal or his designee at which such student shall be informed of the reasons for the disciplinary action and given an opportunity to explain the situation." A student may be suspended before a hearing if an emergency exists. "Emergency" is defined in Section 1(e) as "a situation under which the continued presence of the pupil in school poses such a danger to persons or property or such a disruption of the educational process that a hearing may be delayed until a time as soon after the exclusion of such pupil as possible."

Photo by Marc Young

Section 3 of the new Connecticut law indicates that a more formal hearing may be held if the circumstances surrounding the incident so require. It also provides that "no pupil shall be suspended more than ten times or a total of fifty days in one school year, whichever results in fewer days of exclusion," unless the student is granted the kind of formal hearing described below for expulsion. The Connecticut law further provides: "Any pupil who is suspended shall be given an opportunity to complete any classwork includ-

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ing, but not limited to, examinations which such pupil missed during the period of his suspension."

Expulsion

Expulsion is defined in Section 1(d) as an exclusion from school privileges for more than ten consecutive school days, but it cannot extend beyond the end of the school year. These provisions regarding expulsion also apply to transfer to another school for disciplinary reasons. Section 4 of the law states that unless an emergency exists, "no pupil shall be expelled without a formal hearing held pursuant to sections 4–177 to 4–180, inclusive of the general statutes." If an emergency exists, as defined above, the hearing may be held after the student is excluded from school, but must be held as soon thereafter as possible.

The requirements of a hearing pursuant to Section 4–177 to 4–180, the standard state hearing procedures in Connecticut's Administrative Procedures Act, are set forth below. First, all parties must have reasonable notice. In the case of a minor notice must also be given to the parents or guardians of the pupil.

Section 4–177

> (b) The notice shall include: (1) A statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and regulations involved; (4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.
>
> (c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.
>
> (d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.
>
> (e) The record in a contested case shall include: (1) All pleadings, motions, and intermediate rulings; (2) evidence received or considered; (3) questions and offers of proof, objections and rulings thereon; (4) any decision, opinion or report by the officer presiding at the hearing.
>
> (f) Oral proceedings or any part thereof shall be transcribed on request of any party. The requesting party shall pay accordingly, the cost of such transcript or part thereof.
>
> (g) Findings of fact shall be based exclusively on the evidence and on matters officially noted.

Section 4–178 provides, in part, that oral and documentary evidence may be received, and a party may conduct cross examination. And Section 4–180 provides that a final decision against the student must be in writing or stated in the record. The student or his parents or guardians must be notified in person or by mail of any decision or order, and are entitled to a copy of the decision or order for themselves and their attorney.

Alternative Education for Expelled Students

Section 4(c) of the new Connecticut law provides that "any pupil who is expelled shall be offered an alternative educational opportunity during the period of expulsion." However, if for any reason the parent or guardian of the student does not want to have him/her enrolled in an alternative program, the parent can choose total exclusion from school for his/her child for the expulsion period and not be subject to the usual penalties for not complying with the compulsory education law (Section 10–184).

Commentary

The provision for alternative education during the expulsion period is especially noteworthy because it reflects an educational philosophy that the due process exclusion should not be used to eliminate disruptive students from all schooling,

but rather as a triggering mechanism for special help for such students. Since some alternative educational approaches offered by the school might be educationally or socially unacceptable to the student/parent, the new law provides a parental option for total exclusion from school (without the usual penalties for violating the compulsory education law) if an acceptable alternative cannot be worked out with the school. This approach raises a number of difficult questions *(e.g.,* Is the consent informed?; Will the alternative make it easier for schools to exclude students from the regular class?), but on balance it seems preferable to the *status quo* which all too often excludes from the educational process the very students who are most in need of help. For a fuller discussion of these issues, see M. McClung, "Alternatives to Disciplinary Exclusion From School," 20 *Inequality in Education* 58 (July 1975).

In an earlier draft of the bill, the Education Committee considered setting out in considerable detail the parameters of acceptable student conduct, but concluded that this was a matter best left to the discretion of each local board of education. Therefore the Education Committee reported out a bill with more general standards which authorized the suspension or expulsion of "any pupil whose conduct endangers persons or property or is seriously disruptive of the educational process, *and* which conduct is violative of a publicized policy of such board." (emphasis added). A last minute floor amendment in the General Assembly, however, substituted the word "or" for "and" and thus left the final statute without general standards of conduct. Ironically, this amendment may leave the new law open to the same challenge which successfully invalidated the prior expulsion statute.

The old exclusion statute (Section 10–234 of the Connecticut General Statutes) was typical of many existing state statutes, simply authorizing expulsion for "conduct inimical to the best interests of the school." On July 15, 1975 the Supreme Court of Connecticut upheld a lower court decision which found the old expulsion law too vague to constitute a valid delegation of power by the legislature. The Supreme Court stated: "What the phrase 'inimical to the best interests' may mean to different persons is virtually unlimited." *Mitchell* v. *King* (*Connecticut Law Journal,* July 15, 1975, at page 5). The Court continued:

> Section 10–234, when read in the light of the legal principles enunciated, is unconstitutionally vague on its face. It does not give fair notice that certain conduct is proscribed; it makes no distinction between student conduct on or off school property, during school hours or while school is not in session. It fails to provide any meaningful indication as to what range of behavior would legitimately subject a student to expulsion. Thus, the time, the place, and the nature of student conduct that might be deemed "inimical to the best interests of the school" would lie entirely within the subjective discretion of the board of education. A more specific standard is required. *Id.*

The task is to define prohibited conduct more clearly than with vague phrases like "inimical to the best interests" without going to the other extreme of trying to specify every conceivable kind of misconduct. A reasonable attempt to find middle ground between these two extremes is set forth in Sections 9.1 and 10.1 of "A Sample Student Code," *Phi Delta Kappan* (December 1974).

Rather than simply incorporating such standards in a statute or school disciplinary code and imposing them upon students, however, a strong argument can be made that standards of conduct are more likely to be accepted if the students are given an active role in helping to formulate (and implement) them. Thus a model exclusion statute might authorize "a joint student/faculty committee to suspend or expel any student for conduct it finds to endanger persons or property or to be seriously disruptive of the educational process, and which conduct violates one of the standards of conduct formulated and publicized by such committee." The advantages and disadvantages of various models for student participation are discussed in the handbook *Codes of Student Rights and Responsibilities,* a forthcoming publication of the Center for Law and Education.

Many current state exclusion statutes probably cannot meet the legal test in *Mitchell* v. *King* quoted above. A vagueness challenge, however, even if successful, is not necessarily the best

approach because it offers no solution for a legislative remedy clearly defining standards which are repressive or otherwise questionable. Another approach is to argue an equal protection violation in excluding disruptive children while providing education to other children needing special educational help (and to children who do not need special help). Two pending cases raise this issue: *Dunlap* v. *Charlotte Mecklenburg Board of Education*, C.A. No. 72–72 (W.D.N.C., filed April 17, 1972), and *Fox* v. *Benton*, C.A. No. 74–5–D (S.D. Iowa, filed February 8, 1974).

While a successful vagueness challenge does not in itself guarantee an acceptable remedy, it can force the legislature to rewrite an archaic exclusion statute, and a better approach to disruptive behavior may be incorporated in the process. This proved to be the case in Connecticut where some encouraging substantive provisions were incorporated in the new legislation. The Education Committee, however, refused to exercise a policy role in expanding protection prior to suspension (for example, by requiring an opportunity for parental involvement before the informal hearing so that the parents can be involved in working out a solution to the problem), and simply codified the minimal due process required by the U.S. Supreme Court in *Goss* v. *Lopez*, 95 S.Ct. 729 (1975).

Goss v. *Lopez* and cases like *Mitchell* v. *King* may encourage many states (and local school districts) to revise their laws and regulations concerning disciplinary exclusion from school. Those involved in formulating new standards may have to make some difficult choices between concentrating on procedural or substantive provisions. The courts' natural inclination for procedural remedies should not predetermine the approach. Policymakers obviously have much more flexibility. Rather than expanding due process requirements for short-term suspension, for example, it may be educationally preferable to minimize the harmful effects of suspension by providing opportunities to make up work and exams, expunging the disciplinary action from the student's record at the end of the year, and providing educational alternatives to exclusion which help to remedy the underlying problem.

Merle McClung

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